AIK MING (M) SDN. BHD. & 8 ORS.

v.

CHANG CHING CHUEN & 3 ORS. & ANOTHER CASE

COURT OF APPEAL, KUALA LUMPUR
TUAN GOPAL SRI RAM JCA
DATO' V.C. GEORGE JCA
DATO' HJ. ABU MANSOR BIN ALI JCA
[CIVIL APPEAL NOS. J-02-34-95 & J-02-35-95]
21 JULY 1995

COMPANY LAW: *Notice of meeting - Whether notice served - Question of fact - Credibility of witnesses - Trial Judge having advantage of visual assessment - Whether appellate Court should interfere with trial Judge's finding.*

COMPANY LAW: *Board meeting - Failure to give proper notice - Effect - Section 355(3)(a) Companies Act 1965 - Whether meeting invalidated - Whether Court has discretion to validate meeting - Factors for consideration.*

LAND LAW: *Purchase of land - Defect in transaction - Transaction made subsequent to resolution by reconstituted board - Reconstituted board invalid - Rule in Turquand's case - Whether purchaser protected by rule.*

LAND LAW: *Purchase of land - Deposit paid under contract of sale - Whether purchaser bona fide "purchaser" - Purchaser having notice of caveat entered by caveator - Effect of caveat - Whether purchaser "bona fide".*

LAND LAW: *Caveat - Company owning immovable property - Whether director of company has caveatable interest in the land.*

PRACTICE & PROCEDURE*: Allegation of conspiracy - Conspiracy alleged during submission - Non-joinder of intervener as party - Conspiracy not pleaded - Failure to cross-examine material witnesses - Whether plaintiff entitled to allege conspiracy - Fundamental rules as to procedural fairness.*

These two appeals arose out of the same suit and were heard together by the Court of Appeal. The first appeal was by the 1st defendant company and the 2nd to the 9th defendants against the declaration given by the lower Court in favour of the plaintiffs which had the effect of nullifying a board meeting of the 1st defendant held on 17 April 1990 and all things done thereat and subsequent thereto and the second appeal was against the decision of the lower Court in setting aside the sale of six lots of land by the first defendant company to the intervener. The chronology of the facts are briefly stated.

The first defendant company was the registered proprietor of six lots of land. The plaintiffs and the second and third defendants were directors and shareholders of the first defendant company. On 17 April 1990, a board meeting of the first defendant was held with the attendance of only the second and third defendants. The meeting approved transfers by the third and fourth defendants of all shares registered in the name of the second plaintiff to the ninth defendant with the subsequent declaration that the second plaintiff ceased from being a director by reason of her no longer holding shares in the first defendant, and appointed the fourth, fifth and ninth defendants as directors of the first defendant. A quick succession of meetings followed the first meeting resulting in the removal of the first plaintiff as managing director; the appointment of the second, third and fifth defendants as managing directors; the resolution to sell the six lots of land belonging to the first defendant; and the authorisation

of the second, third and fifth defendants to sell the land and to execute all relevant documents to give effect to such sale.

On 6 September 1990, the first plaintiff entered a private caveat against the register documents of title to the six lots of land.

On 26 October 1990, the second defendant gave an option in favour of one Dato Tan Eng Boon, the chairman of the intervener, to purchase the six lots of land for a sum of RM4.8 million. The option was given in consideration of RM100,000 and when it was exercised on 8 November 1990, the sum was taken as part payment towards the purchase price. The sale was later resolved at the first defendant board meeting and it was also resolved that any two or one director and a secretary was authorised to execute all relevant documents on behalf of the first defendant. A formal sale and purchase agreement was executed on 3 December 1990 simultaneously with 6 memoranda of transfers and the common seals of the 1st defendant and the intervener were accordingly placed on the documents. On 29 December 1990, the 1st plaintiff entered another caveat against the titles to the six lots of land.

On 25 May 1991, the plaintiff caused to be issued a writ challenging the propriety of the board meeting of the first defendant board held on 17 April 1990 and the validity of the sale of the six lots of land. The plaintiffs obtained, on 4 June 1991, an *ex-parte* injunction restraining, *inter alia*, the second, third, fourth, fifth and ninth defendants from dealing with or disposing of the lands in question, and gave the intervener notice of the injunction. The intervener's solicitors on the other hand took out an originating summons for the removal of the first and second caveat and subsequently, order in terms was granted. However, when the six memoranda of transfers were presented to the Director of Lands and Mines by the intervener for registration, it was duly rejected. The intervener then applied to intervene (which was granted) and applied to set aside the injunction (which was rejected).

The action proceeded to trial which went in the plaintiffs' favour, against which the defendants and the intervener subsequently appealed. It was submitted by Counsel for the appellant that the learned Judge had allowed his mind to be affected by the plaintiff's written submission that the intervener had conspired together with the defendant to defraud the plaintiffs and the first defendnat company of the landed properties which formed the substantial assets of the first defendant company, where as such allegation was never pleaded in the plaintiff's statement. It was further submitted in the first appeal, *inter alia*, that the learned Judge was wrong in holding that no notice was served on the plaintiffs and that the notice convening the board meeting of 17 April 1990 was invalid and that even if the meeting of 17 April 1990 and the proceeding thereat were defective, they could and should be cured under s. 355(3)(a) of the Companies Act 1965. In the second appeal, it was contended, *inter alia*, that the intervener as an outsider *vis a vis* the first defendant was entitled to the benefit of the rule in *Turquand's* case and that since the intervener was a *bona fide* purchaser who had paid its money to the first defendant company with no notice of any adverse claim to the lands in question and it has paid the full purchase price, it was entitled to have the transfers in its favour registered.

Held:

Per Gopal Sri Ram JCA (delivering the judgment of the Court):

[1] The validity of all that transpired at the meeting depends upon whether proper notice of that meeting had been served upon the other members of the board by the second defendant as the secretary of the first defendant. The learned Judge had before him two conflicting versions as to the issue of service of notice; the defendants contending that there had been service of the notice and the plaintiffs contending that they had not received

it. The determination of the issue now became a pure question of fact turning upon the credibility of witnesses whom the trial Judge had had the advantage of visual assessment. The approach of the appellate Court upon such a matter is well settled and has been expressed in a number of decisions. When a Judge hears and sees and makes a conclusion or inference with regard to what on balance is the weight of their evidence, that judgment is entitled to great respect, and that quite irrespective of whether the Judge makes any observation with regard to credibility or not.

[2] There was no merit in the argument by the defendant that no difference would have been occasioned by a failure to notify the plaintiffs of that all important meeting. Prior to the changes made to the constitution of the first defendant's board, the plaintiffs formed the majority of the board. The other two directors were the 2nd and 3rd defendants. It does not require much imagination to realise the fate the proposed resolutions would have met had they attended the meeting. There can be no doubt that the votes of the plaintiffs would have, without difficulty, prevailed over those of the defendants and that therefore, there would have been material difference in the event that the plaintiffs had been notified of the meeting. It is also well settled that, unless the articles of a company provide to the contrary, no meeting of a board is valid unless reasonable notice of it and the relevant agenda that is to be discussed at it is given to the directors.

[3] Section 355(3)(a) looks to the justice of a particular case and it is not concerned with the question whether prejudice would result in the making of a validation order. Where the justice of the instant case lay and how discretion should be exercised is a matter eminently within the province of the learned Judge. It must not be forgotten that the section vests the original discretion in the High Court and that the initial function of the appellate Court is one of review only. An appellant must therefore demonstrate that a Judge has committed one or more of those errors which permits the Court of Appeal to exercise a discretion of its own. Having regard to the findings of fact the Judge made, and having regard to the way in which he approached the determination as to where the justice of the case lay, the defendants have failed to discharge this onus.

[4] The rule in *Turquand* when applied to a contract for the purchase of land under the Torrens system has to work hand in hand with the doctrine of the *bona fide* purchaser. The intervener may be entitled to take advantage of the rule in *Turquand* if he can show that he is a *bona fide* purchaser of the six lots of land in question. So the rules about contracts concerning land have to be applied. The purchaser of immovable property under a contract is entitled to assert his rights under the contract against all comers if he demonstrates that he purchased the land in good faith without notice of any adverse claim to the title of the land.

[5] It is settled law that one is not a *bona fide* purchaser until all money has been paid under the contract of sale and that one who only pays the deposit is not a *bona fide* purchaser. When the second caveat was entered, the intervener was not a *bona fide* purchaser of the lands in question. The question then arises as to whether he could become a *bona fide* purchaser by its mere removal, after he had acquired knowledge of its contents. As a matter of law, once a man's mind has become infected with knowledge of an adverse claim or a doubt or cloud upon the vendor's right to convey title before he has paid his money in full, he remains what was at the earlier stage: a person who is not a *bona fide* purchaser.

[6] A charge of conspiracy ought not to be countenanced by a Court unless properly taken in a party's pleading. Such a charge must be supported by full particulars. The evidence led must be in proof of the pleaded case. The standard of proof where a conspiracy to defraud

is alleged is the same as where fraud is alleged. A plaintiff must prove his case beyond a reasonable doubt. It is also essential that a party's case be expressly put to his opponent's material witnesses when they are under cross-examination. A failure in this respect may be treated as an abandonment of the pleaded case and if a party, in the absence of valid reasons, refrains from doing so, then he may be barred from raising it in argument.

[Both appeals dismissed with costs].

[**Bahasa Malaysia** Translation of Headnote]

UNDANG-UNDANG SYARIKAT: *Notis mesyuarat - Samada notis diserahkan - Persoalan fakta - Kebolehpercayaan saksi - Hakim perbicaraan mempunyai faedah penilaian penglihatan - Samada Mahkamah Rayuan patut menganggu keputusan Hakim perbicaraan.*

UNDANG-UNDANG SYARIKAT: *Mesyuarat lembaga - Kegagalan untuk memberi notis berpatutan - Kesan - Seksyen 355(3)(a) Akta Syarikat 1965 - Samada mesyuarat terbatal - Samada Mahkamah mempunyai budibicara untuk mengesahkan mesyuarat - Fakta-fakta untuk dipertimbangkan.*

UNDANG-UNDANG TANAH: *Belian tanah - Kecacatan di dalam transaksi - Transaksi dibuat menurut resolusi lembaga baru yang telah dibentuk - Pembentukan lembaga baru tidak sah - Rukun Turquand - Samada pembeli dilindungi rukun.*

UNDANG-UNDANG TANAH: *Pembelian tanah - Wang pendahuluan dibayar di bawah perjanjian pembelian - Samada pembeli seorang "pembeli" bona fide - Pembeli mempunyai pengetahuan mengenai kaveat yang dimasukkan oleh pengkaveat - Samada pembeli "bona fide".*

UNDANG-UNDANG TANAH: *Kaveat - Syarikat mempunyai harta tak alih - Samada pengarah syarikat mempunyai kepentingan boleh dikaveat di dalam harta tak alih syarikat.*

AMALAN & PROSEDUR: *Pengataan komplot - Pengataan dibuat semasa penghujahan - Pencelah tidak dicantumkan sebagai pihak kepada tindakan - Kegagalan untuk memplid komplot dan untuk memeriksa balas saksi material - Samada plaintiff berhak untuk menimbulkan komplot - Rukun asasi mengenai keadilan prosedur.*

Kedua-dua rayuan ini lahir dari tindakan yang sama dan didengar bersama oleh Mahkamah Rayuan. Rayuan pertama dari defendan syarikat pertama dan defendan kedua hingga kesembilan terhadap deklarasi Mahkamah yang membatalkan mesyuarat lembaga defendan pertama yang diadakan pada 17 April 1990 dan segala yang dilakukan semasa dan sejurus selepas itu dan rayuan kedua merupakan rayuan terhadap keputusan Mahkamah Rendah yang mengenepikan jualan enam lot tanah oleh defendan pertama kepada pencelah. Susunan fakta dinyatakan secara ringkas.

Defendan syarikat pertama adalah tuanpunya tanah enam lot tanah. Plaintif dan defendan kedua dan ketiga merupakan pengarah dan pemegang saham defendan syarikat pertama. Pada 17 April 1990, mesyuarat lembaga defendan pertama telah diadakan dengan kehadiran defendan kedua dan ketiga sahaja. Mesyuarat tersebut meluluskan pindahmilik oleh defendan ketiga dan keempat saham-saham yang didaftarkan di atas nama plaintif kedua kepada defendan kesembilan bersama deklarasi bahawa plaintif kedua dilucutkan dari jawatan pengarah di atas alasan bahawa beliau tiada lagi memegang saham defendan syarikat pertama, dan seterusnya defendan keempat, kelima dan kesembilan dilantik menjadi pengarah defendan pertama. Secepat kilat, mesyuarat lain menuruti yang pertama menyebabkan perlucutan plaintif pertama dari jawatan pengarah; perlantikan defendan kedua, ketiga dan kelima sebagai pengarah urusan; resolusi penjualan enam lot tanah yang dipunyai oleh defendan pertama; dan pemberikuasaan

kepada defendan kedua, ketiga dan keempat untuk menjual tanah tersebut dan menyempurnakan segala dokumen untuk membolehkan jualan tersebut. Pada 6 September 1990, plaintif pertama memasukkan kaveat ke atas dokumen hakmilik daftaran keenam-enam lot tanah tersebut.

Pada 26 Oktober 1990, defendan kedua memberi opsyen kepada Dato Tan Eng Boon, pengerusi pencelah, untuk membeli keenam-enam lot tanah tersebut bagi jumlah sebanyak RM4.8 juta. Opsyen tersebut diberi atas balasan sebanyak RM100,000 dan apabila ianya digunakan pada 8 November 1990, jumlah tersebut diambil sebagai pembayaran sebahagian harga jualan. Jualan tersebut kemudiannya diluluskan pada mesyuarat lembaga defendan pertama dan juga diluluskan bahawa mana-mana dua pengarah atau seorang pengarah dan setiausaha diberikuasa untuk menyempurnakan segala dokumen yang berkenaan bagi pihak defendan pertama. Satu perjanjian jualbeli yang formal disempurnakan pada 3 Disember 1990 bersama 6 memoranda pindahmilik dan meterai biasa diletakkan pada dokumen yang berkenaan. Pada 29 Disember 1990, plaintif pertama memasukkan satu kaveat ke atas hakmilik enam tanah berkenaan.

Pada 25 Mei 1990 plaintif telah menyebabkan satu writ diisu yang mencabar kebenaran mesyuarat lembaga defendan pertama tersebut yang diadakan pada 17 April 1990 dan juga mencabar keesahan jualan keenam-enam lot tanah tersebut. Pada 4 Jun 1991, plaintif telah mendapatkan injunksi *ex parte* yang menghalang, di antaranya, defendan kedua, ketiga, keempat, kelima dan kesembilan dari berurusan dengan atau melupuskan tanah yang berkenaan, dan memberi notis kepada pencelah mengenai injunksi tersebut. Peguam pencelah pula mengeluarkan satu saman pemula untuk mengenepikan kaveat pertama dan kaveat kedua dan sejurus selepas itu, perintah seperti dipohon diberikan. Walaubagaimanapun, apabila keenam-enam memoranda pindahmilik diserahkan kepada Pengarah Tanah dan Galian oleh pencelah untuk pendaftaran, ianya ditolak. Pencelah memohon untuk mencelah (di mana ianya dibenarkan) dan juga memohon untuk mengenepikan injunksi tersebut (di mana ianya ditolak).

Tindakan tersebut dibicarakan dan keputusannya menyebelahi plaintif, terhadap mana defendan dan pencelah merayu. Peguam bagi pihak perayu berhujah bahawa yang arif Hakim telah membenarkan pemikirannya dipengaruhi oleh penghujahan bertulis plaintif bahawa pencelah telah berkomplot dengan defendan untuk memfraud plaintif dan defendan syarikat pertama berkaitan hartanah yang merupakan aset terbesar defendan syarikat pertama, padahal tuduhan tersebut tidak pernah diplid di dalam pernyataan tuntutan plaintif. Telah juga dihujahkan pada rayuan pertama, di antaranya, bahawa Hakim yang arif salah apabila memutuskan tiada notis diserahkan kepada plaintif dan bahawa notis yang memulakan mesyuarat lembaga pada 17 April 1990 tidak sah dan walaupun terdapat kecacatan pada mesyuarat lembaga pada 17 April 1990 dan prosiding yang diadakan, ianya boleh dipulihkan di bawah s. 355(3)(a) Akta Syarikat 1965. Di dalam rayuan kedua telah dihujahkan, di antaranya, bahawa pencelah sebagai orang luar *vis a vis* defendan pertama berhak kepada faedah hukum di dalam kes *Turquand* dan disebabkan pencelah seorang pembeli *bona fide* yang telah membayar penuh harga belian, ia berhak pindahmilik tersebut didaftarkan kepadanya.

Diputuskan:

Oleh Gopal Sri Ram HMR (menyampaikan penghakiman Mahkamah):

[1] Keesahan segala yang terjadi di mesyuarat tersebut bergantung kepada samada notis betul mesyuarat tersebut telah diserahkan kepada semua ahli lembaga tersebut oleh defendan kedua sebagai setiausaha defendan pertama. Hakim yang arif berhadapan dengan dua cerita berlainan mengenai isu penyerahan notis tersebut; defendan mengatakan bahawa terdapat penyerahan notis tersebut dan plaintif mengatakan mereka tidak menerima notis tersebut. Pemutusan isu tersebut kini menjadi persoalan fakta semata-mata berpandukan kepada

kebolehpercayaan saksi dimana Hakim perbicaraan berpeluang menggunakan penilaian penglihatan. Pendekatan Mahkamah Rayuan mengenai perkara ini telah ditetapkan dan telah dilahirkan di dalam banyak keputusan. Apabila seseorang Hakim itu mendengar dan melihat dan membuat keputusan atau kesimpulan dalam mempertimbangkan pengaruh keterangan mereka itu, keputusan tersebut berhak kepada penghormatan yang tinggi, dan ianya tidak kira samada Hakim membuat pemerhatian mengenai kebolehpercayaan ataupun tidak.

[2] Tiada merit di dalam hujahan defendan bahawa tiada perbezaan yang akan terjadi di dalam kegagalan untuk memberitahu plaintif pertama, kedua dan ketiga mengenai mesyuarat yang mustahak itu. Sebelum sebarang pertukaran dibuat pada perlembagaan defendan pertama, plaintif membentuk majoriti lembaga tersebut. Kedua-dua pengarah lain adalah defendan kedua dan ketiga. Ianya tidak memerlukan banyak imaginasi untuk menyedari nasib resolusi yang dicadangkan sekiranya plaintif menghadiri mesyuarat tersebut. Tiada keraguan bahawa undian plaintif boleh, tanpa kesusahan, mengatasi undian defendan and bahawasanya, akan terdapat perbezaan material sekiranya plaintif diberitahu mengenai mesyuarat tersebut. Adalah juga ditetapkan bahawa, melainkan perkara-perkara syarikat mengatakan disebaliknya, tiada mesyuarat lembaga sah melainkan notis berpatutan mengenainya dan agenda yang akan dibincangkan berkaitan dengannya diberikan kepada pengarah.

[3] Seksyen 355(3)(a) melihat kepada keadilan sesuatu kes itu dan ia tidak berkisar kepada persoalan samada prejudis akan terjadi apabila perintah pengesahan diberikan. Di mana keadilan sesuatu kes itu berada dan bagaimana budi bicara patut digunakan adalah sesuatu di dalam bidangkuasa Hakim yang arif. Tidak patut dilupakan bahawa seksyen tersebut meletakkan budi bicara asal di dalam Mahkamah Tinggi dan bahawa fungsi awal Mahkamah Rayuan adalah mengkaji semula sahaja. Perayu mestilah menunjukkan bahawa Hakim telah melakukan salah satu kesalahan yang membenarkan Mahkamah Rayuan menggunakan budi bicaranya sendiri. Beralaskan kepada keputusan fakta yang telah dibuat oleh Hakim, dan memandangkan kepada cara beliau mendekati keputusan di mana keadilan kes berada, defendan telah gagal untuk melepaskan beban ini.

[4] Hukum di dalam *Turquand* apabila dipakai kepada sesuatu kontrak membeli tanah di bawah sistem Torrens mestilah boleh bergandingan dengan doktrin pembeli *bona fide*. Pencelah mungkin boleh mendapat faedah dari hukum *Turquand* jika ia boleh menunjukkan bahawa ia pembeli *bona fide* keenam-enam lot tanah tersebut. Jadi hukum kontrak-kontrak mengenai tanah adalah terpakai. Pembeli harta tak alih di bawah sesuatu kontrak berhak menuntut haknya terhadap sesiapa sahaja sekiranya ia menunjukkan bahawa ia membeli tanah tersebut dengan niat baik tanpa sebarang notis tuntutan berlainan kepada hakmilik tanah tersebut.

[5] Adalah ketetapan undang-undang bahawa seseorang itu bukanlah pembeli *bona fide* sehingga seluruh wang telah terbayar di bawah kontrak belian tersebut dan sesungguhnya, seseorang yang hanya membayar wang pendahuluan bukanlah seorang pembeli *bona fide*. Apabila kaveat kedua dimasukkan, pencelah bukanlah pembeli *bona fide* tanah tersebut. Persoalan timbul samada beliau boleh menjadi pembeli *bona fide* dengan pengalihan kaveat tersebut, setelah ia mengetahui mengenai isi kandungannya. Sebagai undang-undang, setelah pemikiran seseorang itu telah dipengaruhi dengan pengetahuan tuntutan berlainan atau keraguan di atas hak penjual memindah milik sebelum bayaran penuh dibuat, ia tetap menjadi apa yang ianya adalah pada awal masa; seseorang yang bukannya pembeli *bona fide*.

[6] Pengataan komplot tidak patut dipersetujui oleh Mahkamah melainkan pihak tersebut telah memplid dengan betul. Dakwaan tersebut mestilah disokong dengan butir-butir yang penuh. Keterangan yang diberi mestilah sebagai bukti kepada kes yang diplid. Ukuran membukti di

mana komplot untuk memfraud dikatakan adalah sama dengan fraud. Plaintif mesti membuktikan kesnya tanpa keraguan yang munasabah. Adalah juga perlu kes sesuatu pihak itu dinyatakan kepada saksi material lawannya semasa mereka diperiksa balas. Kegagalan melakukan yang tersebut boleh dianggap sebagai meninggalkan kes yang diplid dan sekiranya satu pihak, tanpa sebab yang sah, menahan diri dari melakukan sedemikian, ia boleh dilarang dari menimbulkannya di dalam hujahnya.

[Kedua-dua rayuan dibuang dengan kos].

Cases referred to:
Mahadevan v. Patel [1975] 2 MLJ 207 ***(refd)***
Hew Sook Ying v. Hiw Tin Hee [1992] 2 MLJ 189 ***(refd)***
Luggage Distributors Sdn. Bhd. v. Tan Hor Teng [1995] 2 AMR 969 ***(refd)***
Tajjul Ariffin v. Heng Cheng Hong [1993] 2 MLJ 143 ***(refd)***
Browne v. Dunn [1893] 6 R 67 ***(refd)***
Carapiet v. Derderian AIR [1961] Cal. 359 ***(refd)***
Royal British Bank v. Turquand [1856] 119 ER 886 ***(refd)***
Clarke v. Edinburgh Tramways Co. [1919] SC (HL) 35 ***(refd)***
Seng Heng Electrical v. Chua Len Teng [1970] 1 MLJ 67 ***(refd)***
Bentley-Stevens v. Jones [1974] 1 WLR 638 ***(refd)***
Dr. Mahesan & Ors. v. Ponnusamy & Ors. [1994] 3 MLJ 312 ***(refd)***
Young v. Ladies Imperial Club Ltd. [1920] 2 KB 523 ***(refd)***
Public Prosecutor v. Dato Harun & Ors. [1977] 1 MLJ 180 ***(refd)***
Chan Choon Ming v. Low Poh Choon & Ors. [1995] 1 CLJ 812 ***(refd)***
Mitropolous v. The Greek Orthodox Church and Community of Marrickville & District Ltd. [1993] 10 ACSR 135 ***(refd)***
Suntoso Jacob v. Kong Miao Ming [1986] 2 MLJ 170 ***(refd)***
Chettiar v. Chettiar [1962] MLJ 143 ***(refd)***
Re Australian Continental Resources Ltd. 1 ACLR 405 ***(refd)***
Morris v. Kanssen [1946] AC 459 ***(refd)***
Kreditbank Cassel G.M.B.H. v. Schenkers Ltd. [1927] 1 KB 826 ***(refd)***
Chew Hock San & Ors. v. Connaught Housing Development Sdn. Bhd. [1985] 1 MLJ 350 ***(foll)***
KL Engineering Sdn. Bhd. & Anor. v. Arab Malaysian Finance Bhd. [1994] 2 MLJ 201 ***(foll)***
Tesco Ltd. v. Nattrass [1971] 2 WLR 1166 ***(refd)***
H.L. Bolton (Engineering) Co. Ltd. v. T.J. Graham Ltd. [1957] 1 QB 159 ***(refd)***
Meridian Global Funds Management Asia Ltd. v. Securities Commission (The Times, 29 June 1995) ***(refd)***
Northside Developments Pty. Ltd. v. Registrar General 170 CLR 146 ***(refd)***
Eng Mee Yong v. Letchumanan [1979] 2 MLJ 212 ***(refd)***
Doshi v. Yeoh Tiong Lay [1975] 2 MLJ 85 ***(foll)***
M & J Frozen Food Sdn. Bhd. v. Siland Sdn. Bhd. [1994] 1 MLJ 294 ***(foll)***
J & H Judt (Holdings) Oty. Ltd. v. The Bank of New South Wales [1971] 125 CLR 546 ***(dist)***
Osmanoski v. Rose [1974] VR 523 ***(refd)***
Bhup Narain Singh v. Gokhul Chand Mahton LR 61 IA 115 ***(foll)***
Sinna Ponnu v. Singaru Odayar [1969] 2 Madras LJ 358 ***(refd)***
Vomisetti Paparao v. Jonnada Venkataramana [1970] 2 An. WR 280 ***(refd)***
Linggi Plantations v. Jagatheesan [1972] 1 MLJ 89 ***(refd)***
In re Westbourne Gallaries Ltd. [1973] AC 360 ***(refd)***
M.A. Clyde v. Wong Ah Mei [1970] 2 MLJ 183 ***(refd)***

Legislation referred to:
Companies Act 1965, s. 355(3)(a)
Evidence Act 1872 (India)
Evidence Act 1950, s. 17, 18, 21, 114(g), 145, 155(c)
National Land Code 1965

Real Property Gains Tax Act 1976, s. 21B(1)(a), Part II of Schedule
Specific Relief Act 1950, ss. 11(2), 26 (b)

Other sources referred to:
Palmer's Company Law, 24th Edn., p. 247
Ford on Company Law, 5th Edn., p. 106

Civil Appeal No. J-02-34-95
For the appellant - C.V. Das (Harcharan Singh and K. Mohan with him); M/s. Harcharan & Peters
For the respondents - P.K. Nathan (L. Parthiban with him); M/s. L. Parthiban & Associates

Civil Appeal No. J-02-35-95
For the appellants - Jeyanthini Kannaperan (Maidzuara Mohammed with her); M/s. Shearn Delamore & Co.
For the respondents - P.K. Nathan (L. Parthiban with him); M/s. L. Parthiban & Associates

JUDGMENTS

Gopal Sri Ram JCA:

Introduction

These appeals were called on for hearing on 9 May 1995 but were not taken in the order in which they appeared in the list of appeals. Both appeals arise out of the same suit. It was therefore decided, with the concurrence of all Counsel, that civil appeal no. 35/95 ("the first appeal") would be taken first and if it failed then civil appeal no. 34/95 ("the second appeal") would be taken next. This course was resorted to because, it was agreed that if the first appeal succeeded, the second would be deemed to have succeeded as well. For convenience, I shall refer to the parties according to the title assigned to each of them in the Court below.

The first appeal is by the second to the ninth defendants who are members of the Chang family, consisting of the first plaintiff's wife by his first marriage, the children of that marriage, the spouse of the third defendant, as well as by the first defendant which is the family company. The appellant in the second appeal is the purchaser of six lots of land owned by the first defendant and situated in Pontian. It intervened in the suit and resisted the claim and was designated, 'intervener' in the Court below.

The respondents in both appeals are the first plaintiff, his wife by his second marriage (solemnised according to Muslim law), and his brother and sister respectively. They succeeded in obtaining from Haidar J certain declarations which had the effect of:

(i) nullifying a board meeting of the first defendant held on 17 April 1990 and all things done thereat subsequent thereto; and

(ii) setting aside the sale of the six lots of land by the company to the intervener.

At the conclusion of arguments advanced by Cik Jayanthini Kannaperan of Counsel for the appellants in the first appeal, this Court dismissed that appeal without calling upon Encik Nathan of Counsel for the respondents. Thereafter, Encik Das who appeared for the intervener argued the second appeal and, after hearing Encik Nathan in reply, that appeal was also dismissed. My reasons for both decisions now follow.

Facts and Chronology

As I have already said, the first defendant company is the registered proprietor of six lots of land. At all material times the issue documents of title to these lands were in the custody of Messrs. Lim, Tan & Heo, a firm of solicitors. The first defendant came to acquire the lands in this way.

Initially, these six lots belonged to the first plaintiff. He and his first wife (the second defendant) incorporated the first defendant company in 1962, and were its subscribing shareholders and directors. The first defendant's registered office is in Sibu. In 1973, the first plaintiff transferred the six lots to the first defendant at RM10,000 an acre. As each of his children by the first marriage attained the age of majority, he caused the first defendant company to allot shares in the company to such child. However, almost simultaneously with such allotment he got each child to execute undated and blank transfers which he held, together with all the relevant share certificates. The children paid nothing for those shares.

At all material times, the second plaintiff was a director and shareholder of the first defendant company. She held 11,658 shares of RM100 each in it. Her share certificates are all dated 20 April 1988. She became a director of the first defendant sometime in 1989. By the terms of the articles of the first defendant, ownership of its shares is a pre-requisite to be a member of its board. On 17 April 1988, she executed two deeds of irrevocable power of attorney: one was in favour of the third defendant and the other was in favour of the fourth defendant. On the same date, she executed two declarations of trust in favour of the third and fourth defendants respectively. Both the power of attorney and the declaration of trust in the third defendant's favour declare that she holds 6,400 shares in trust for him, while those in favour of the fourth defendant makes a similar declaration in respect of the balance of 5,258 shares.

In March 1988, i.e. before the execution of these powers of attorney, the first plaintiff caused to be incorporated a company known as Rahimah Dollah Holdings Sdn. Bhd. It is not in dispute that although the second plaintiff was shown as its principal shareholder, its business and affairs were entirely under the control of the first plaintiff. From about December 1989 until about May 1990, the first plaintiff transferred funds in excess of RM600,000 from the account of the first defendant to Rahimah Dollah Holdings Sdn. Bhd. It would appear that there was no, or no proper, resolution by the board of the first defendant authorising these transfers.

A reading of the printed evidence leaves me with the distinct impression that the first plaintiff was treating both companies as sole proprietorships owned by him.

On 17 April 1990 a meeting of the first defendant's board was held in Singapore. Only two directors attended. They were the second and the third defendants. The second defendant is, and was at all material times, also the secretary of the first defendant company. That meeting purported to approve transfers by the third and fourth defendants to the ninth defendant of the shares registered in the name of the second plaintiff. The meeting also purported to declare that the second plaintiff had ceased to be a director by reason of her no longer holding shares in the first defendant. It then proceeded to appoint the fourth, fifth and ninth defendants as directors of the first defendant. It is the validity of this meeting that primarily came under challenge in the Court below.

The meeting of 17 April 1990 was followed by a quick succession of meetings of the first defendant's board. On 10 May 1990 a meeting was held at which the second, third, fourth fifth and ninth defendants were present. At that meeting the first plaintiff was removed as the managing director and the second, third, and fifth defendants were appointed as managing directors. About two weeks later, that is to say, on 26 May 1990, the re-constituted board met and resolved that the six lots of land belonging to the first defendant be sold. Authority was then given to the second, third and fifth defendants to sell the lands either by public auction or by private treaty. These defendants were also authorised to execute under seal all relevant documents to give effect to any such sale. By a coincidence, on the same date, i.e. 26 May 1990, the first plaintiff married the second plaintiff in Thailand according to Muslim law.

In about April or May 1990, there was a quarrel between the first plaintiff, the second defendant and the third defendant as a result of which the first plaintiff was either driven out of (according to his evidence) or left (according to the evidence of the defendants) the family home in Singapore. Under cross-examination it was put to the first plaintiff that despite the quarrel he continued to visit the family home but he denied it. Neither the defendants nor the intervener articulated this before the learned Judge who, because of the way in which the case was argued before, him, quite rightly refrained from saying anything about it. I refer to this event only because it was relied upon by the intervener, although Counsel for the defendants before us did not touch upon it at all.

On 6 September 1990, the first plaintiff entered a private caveat ("the first caveat") against the register documents of title to the six lots of land. The Form 19B prescribed by the National Land Code, 1965 and used to make the entry refers to the supporting statutory declaration for the grounds on which the caveat rested. That declaration, in material respects, reads as follows:

> I, Chang Ching Chuen care of No. 22, Tan Sri Road, Sibu, Sarawak, East Malaysia do hereby solemnly and sincerely declare as follows:
>
> 1. I am the chairman and managing director of Aik Ming (Malaysia) Sdn. Bhd., a company incorporated and registered in Malaysia under the Companies Act 1965 and having its registered office at No. 22, Tan Sri Road, Sibu, Sarawak (hereinafter referred to as 'the said company')
>
> 2. The said company is the registered proprietor of the lands described in the Schedule hereto (hereinafter referred to as 'the said lands').
>
> 3. The title deeds of the said lands have been lost or mislaid or taken away by unauthorised person or persons.
>
> 4. In order to prevent unauthorised dealings in the said lands or any part thereof, I pray that a caveat be lodged against the said lands by the said company.

The lands adjacent to the six lots in question were at all relevant times owned by Dato Tan Eng Boon, the chairman of the intervenor. He had been approached by two brokers, Quek and Lai, who had told him that the first defendant's six lots were up for sale. Dato Tan was very keen on buying them. According to him, he was told by Quek and Lai that the asking price was RM6 million, but he had negotiated this down to RM4.8 million. Neither Quek nor Lai were called to give evidence at the trial although they were, Encik Nathan told us without contradiction, physically present in Court. This resulted in the learned Judge drawing an adverse inference. Whether he was correct in doing so is a matter that I will deal with later.

On 26 October 1990, the second defendant, on behalf of the first defendant, gave an option in favour of Dato Tan to purchase the six lots for a sum of RM4.8 million. The option was given for valuable consideration. Dato Tan paid a sum of RM100,000 for it. If he failed to exercise the option, this sum was forfeitable, but if he did, then it was to be taken as payment towards the purchase price. According to the evidence led at the trial, this sum of RM100,000 was paid by the intervener to the second defendant in Singapore. It was paid in cash. This money does not appear to have found its way into the bank account of the first defendant. A point was made that despite the payment of such a large sum of money in cash, no receipt was ever given by or asked of the first defendant. I then asked Encik Nathan during the course of his argument whether the option itself did not constitute a good and sufficient receipt. He answered that at best it was receipt from the **second defendant** but not from the **first defendant**. I think that there is merit in the response of Counsel. Dato Tan was given

physical possession of the six lots upon the grant of the option to him and it would appear that even before he exercised it he had arranged for improvements to be made to them.

It appears that the option was exercised on 8 November 1990: for on that date a firm of solicitors, Messrs. K.H. Choo & Co., acting for the intervener, wrote to Messrs. Yeo, Tan, Hoon & Tee, solicitors, purportedly acting for the first defendant company as vendor, forwarding to the latter a sum of RM568,000 as part of the purchase price and a draft of the proposed sale and purchase agreement. For convenience, I shall refer to the latter firm as "the vendor's solicitors". There then followed a short exchange of correspondence between these solicitors settling the terms of the sale and purchase agreement. Meanwhile, on or about 9 November 1990, the intervener's solicitors entered a private caveat against the register documents of title to the six lots to protect their client's interest pending completion of the sale.

On 1 December 1990, the board of the first defendant met. Only three directors were present. They were the second, the third and the fifth defendants. At that meeting a resolution was passed, which, is in the following terms:

> It was noted that Mdm Yap Poh Eng, Miss Amy Chang & Mr. Peter Chang, having been duly authorised by the board of directors on 26 May 1990 to act on their behalf, reported that the company has sold the six (6) pieces of properties held under Geran 16210, Lot 1832, G.M. 276, Lot 876, G.M. 272, Lot 877, G.M. 273, Lot 773, G.M. 274, Lot 874 and G.M. 275, Lot 875 all in the Mukim of Jeram Batu comprising a total area of 53A, 2R, 12P or thereabout at the selling price of Malaysian Ringgit Four Million and Eight Hundred Thousand (RM4,800,000) to M/s. Pekan Nenas Industries Sdn. Bhd. of Suite 138, 1st Floor, Johor Tower, 80100 Johor Bahru, Johore subject to the terms and conditions set out in the sale and purchase agreement concerned.
>
> It was resolved.
>
> That any two (2) directors or one director and a secretary be and are hereby authorised to execute all relevant documents on behalf of the company.
>
> That the common seal of the company be affixed to all relevant documents relating to the sale in accordance with the articles of association of the company.

Now, there is one matter of some importance that I must make mention of before proceeding any further. It concerns the omission from the foregoing minutes of the receipt of the sum of RM100,000 by the second defendant from the intervener. I will deal with the significance of this later.

On 3 December 1990, the formal sale and purchase agreement was executed. It is expressed to have been made between the first defendant and the intervener. In accordance with the well recognised conveyancing practice that obtains in this country, six memoranda of transfers in Form 14A were executed purportedly by the first defendant as vendor simultaneously with the execution of the sale and purchase agreement. This was done for the purpose of obtaining from the Collector of Stamp Duties, an adjudication of the stamp duty payable upon the instrument of transfer. These transfers were to be held in escrow pending the completion of the sale. The common seal of the first defendant was placed on the instruments of transfer and was witnessed by the signatures of the second and third defendants. The intervener placed its common seal on the six memoranda of transfer on 8 December 1990. Soon after the execution of the sale and purchase agreement, Dato Tan commenced improvements to the lands in question.

Before I continue with the recital of the chronology, it is necessary for me to make a few observations about the sale and purchase agreement and the several memoranda of transfer. Firstly, the intervener's registered office is given as its address in the agreement. This is what normally happens. However, in respect of the first defendant, its address is given as care of its solicitors in the matter of the sale and purchase. Now that is something that strikes me as being quite out of the ordinary since the first defendant is a Malaysian company and has its registered office in Sibu. I will say more about it later when I come to consider the rival contentions advanced on behalf of the plaintiffs and the intervener respectively. Secondly, that it was not executed by placing the seal of the first defendant upon it. Instead, a rubber stamp bearing the name of the first defendant company was used with the second and the third defendants signing on its behalf. Thirdly, the agreement refers to the payment of a deposit of RM668,000. That sum is made up of the initial payment of RM100,000 under the option and the sum of RM568,000 sent under cover of the letter dated 8 November 1990 to which I have already referred. Fourthly, that the balance of the purchase price was to be paid not later than 1 March 1991, i.e. three months from the date of the agreement. Lastly, as has been earlier observed, the intervener had purported to execute the six memoranda of transfer on 8 December 1990. However, it had not come into existence as at that date! It was incorporated on 19 December 1990.

On 22 December 1990, the Collector of Stamp Duties assessed the *ad valorem* stamp duty payable on the six memoranda of transfer at RM5,002,968.75, that is to say about RM200,000 more than the price supposedly agreed upon between the parties.

On 29 December 1990, an extraordinary general meeting of the intervener company was held at which was passed the following resolution:

> WHEREAS Mr. Tan Eng Chia had on 3 December 1989 (*sic*) signed an agreement on behalf of the company to purchase the following pieces of land situated in the Mukim of Jeram Batu in the State of Johor together with the building erected thereon for a total consideration of Malaysian Ringgit Four Million Eight Hundred Thousand Only (RM4,800,000)
>
> (There then follows a recital of the particulars of the six lots).
>
> IT IS HEREBY RESOLVED that the said transaction be and is hereby ratified by the company.

It is noteworthy that the foregoing resolution ratifies only the sale and purchase agreement but not the several memoranda of transfer. Nor is there any ratification of the act of placing the seal of the company upon the several instruments of transfer. These are matters that will receive further consideration at the appropriate stage.

The next important event also occurred on 29 December 1990. On that date the first plaintiff entered another caveat ("the second caveat") against the titles to the six lots. He alleged that the second caveat was to protect his interest as a director of the first defendant over the lands in question. The essential paragraphs of the statutory declaration in support of the second caveat, which contain far more particulars than that lodged in support of the first caveat, read as follows:

> 1. I am the managing director of M/s. Aik Ming (Malaysia) Sdn. Bhd. having a registered office at No. 22, Tan Sri Road, Sibu, Sarawak, East Malaysia hereinafter referred to as 'the said company').
>
> 2. By an extraordinary general meeting of the said company held on 11 July 1990 it was resolved that I be reconfirmed/reappointed in the company as the sole managing director of the said company.

3. The other shareholders of the said company are family members who are holding the majority shares of the said company in trust for me by enjoyment as beneficial owner and who have executed the necessary transfer forms in my favour.

4. The said company owns assets in West Malaysia and these assets include real property in Pontian, namely... (and there follows a recital of the relevant title numbers)

5. In view of recent disputes between me and other shareholders, I have good reasons to believe that the other shareholders in the said company are making attempts to dispose off the landed assets of the said company without my knowledge, consent and approved (*sic*).

6. I verily believe that the landed assets of the said company are presently in jeopardy and this caveat is lodged to protect both the personal and corporate interest of the said company.

In early February 1991, an attempt was made by the second and the third defendants to remove the first caveat by way of an application to the Land Administrator under s. 326 of the National Land Code. The application for removal was prepared by the intervener's solicitors and executed by the aforesaid defendants. That application proved unsuccessful. There then followed an exchange of correspondence to which I must make some detailed reference. It begins with a letter dated 20 February 1991, from the intervener's solicitors to the vendor's solicitors in the following terms:

K.H. Choo & Co.
Advocates & Solicitors
Johor Bahru

20 February 1991

Our Ref: CKH/W/658/90

Your Ref: Y/d1/3189/90 1.2

Messers Yeo, Tan, Hoon & Tee
Room 704 & 705, 7th Floor
Asia Life Building
Jalan Segget
Johor Bahru

Dear Sirs,

Re: Geran 16210 Lot 1832 Mukim of Jeram Batu
G.M. 276 Lot 876 " " " "
G.M. 272 Lot 877 " " " "
G.M. 273 Lot 773 " " " "
G.M. 274 Lot 874 " " " "
G.M. 275 Lot 875 " " " "

We refer to the abovementioned matter and the sale and purchase agreement dated 3 December 1990 and kindly be informed that our clients have forward to us the sum of RM4,132,000 being the balance of the purchase price of the said properties. Further be informed that our search on the titles of the said properties revealed that all the said properties were caveated by our [I think they meant "one"] Chang Chin Chuan, a director and shareholder of your clients, Messrs. Aik Ming (Malaysia) Sdn. Bhd. In such circumstances your clients are unable to deliver to our clients a valid and registrable transfer of all the properties in favour of our clients.

Please confirm whether your clients will be able to secure the withdrawal of the said caveat. Your early response hereto is appreciated.

Yours faithfully,

Sgd.

I pause to observe that it is unclear from this letter which caveat the intervener's solicitors were referring to; because as at the date of the letter the first plaintiff had entered two caveats - one in early September and another in late December of 1990. The intervener's solicitors apparently did not await a response to their letter of 20 February 1991. Instead they wrote another letter to the vendor's solicitors on 25 February 1991. It reads as follows:

K.H. Choo & Co.
Advocates & Solicitors
Johor Bahru

25 February 1991

Our Ref: CKH/SAG/658/90

Your Ref: Y/dl/3199/9011.2

Messrs. Yeo, Tan, Hoon & Tee
Room 704 & 705, 7th Floor
Asia Life Building
Jalan Segget
Johor Bahru

Dear Sirs

Re: Geran 16210 Lot 1832 Mukim of Jeram Batu
G.M. 276 Lot 876 " " " "
G.M. 272 Lot 877 " " " "
G.M. 273 Lot 773 " " " "
G.M. 274 Lot 874 " " " "
G.M. 275 Lot 875 " " " "

Further to our letter dated 20 February 1991, we forward herewith our PBB cheque for a sum of RM4,132,000 being the balance of the purchase price of the aforesaid properties on your undertaking to reimburse us your clients' proportionate share of the current quit rent and assessment which have been paid by our clients.

Take notice that your clients are in breach of cl. 4 of the said sale and purchase agreement as all the said properties are caveated by your client's shareholder/director and therefore the transfer thereof cannot be effected in favour of our clients. Accordingly, kindly indicate to us whether you will be releasing the balance of the said purchase price to your clients.

Yours faithfully,

Sgd.

On 8 March 1991 the vendor's solicitors replied to the intervener's solicitors in the following terms:

Yeo, Tan, Hoon & Tee
Advocates & Solicitors
Johor Bahru

8 March 1991

M/s. K.H. Choo & Co.
Advocates & Solicitors
Johor Bahru

Dear Sirs,

Re: Geran 16210 Lot 1832 Mukim of Jeram Batu
G.M. 276 Lot 876 Mukim of Jeram Batu
G.M. 272 Lot 877 Mukim of Jeram Batu
G.M. 273 Lot 773 Mukim of Jeram Batu
G.M. 274 Lot 874 Mukim of Jeram Batu &
G.M. 275 Lot 875 Mukim of Jeram Batu

We refer to the above and the supplementary agreement dated 7 March 1991.

As requested, we forward the following for your further action:

(a) A copy of our client's resolution dated 26 May 1990

(b) A copy of our client's resolution dated 1 December 1990; and

(c) Our cheque no. PB 815910 for RM4,132,000 to be held by you as stakeholder and to be dealt with strictly pursuant to the terms of the supplementary agreement.

Kindly acknowledge receipt.

Yours faithfully

encl.

c.c. client (Attn: Madam Yap Poh Eng/Mr. Peter Chang)

It is to be noticed that the letter makes mention of a supplementary agreement dated 7 March 1991. This document never surfaced at the trial. The only agreement that was produced at the trial was the sale and purchase agreement dated 3 December 1990. No explanation appears to have been proffered by either the defendants or the intervener for the nonproduction of this document. The terms of this supplementary agreement and the purpose for which it was entered into therefore remain a mystery. Yet the letter of 8 March 1991 speaks of the balance of the purchase price being dealt with according to this agreement. I need only add that the RM4,132,000 which was returned by the vendor's solicitors to the intervener's solicitors was in turn returned by them to their client.

According to Dato Tan, a meeting took place at his office in Singapore in the middle of March 1991. Those present were Dato Tan, the second defendant and the third defendant. At that meeting Dato Tan, acting on behalf of the intervener handed over to the second defendant a sum of S$2,652,744 being the equivalent of RM4,132,000 in cash. He was given the first defendant's receipt for the payment. That receipt is dated 15 March 1991.

If one were to accept Dato Tan's evidence as being accurate, then it would follow that he was already in possession of the resolutions sent to his solicitors under cover of the letter dated 8 March 1991. But for reasons that will appear later this could not have happened.

Now, the money which the second defendant received from Dato Tan was not deposited into the first defendant's bank account. Instead, the second defendant placed the cash in a security deposit box at a bank in Singapore opened and maintained in her name and in the name of herself and the first plaintiff. She then loaned out the money, to use her own words, "to all shareholders".

On 25 May 1991 the plaintiffs caused to be issued the writ in these proceedings challenging the propriety of the meeting of the first defendant's board held on 17 April 1990. There was also a challenge taken as to the validity of any sale of the six lots by the defendants. The intervener was not joined as a party to the action although the sale to it was pleaded in the statement of claim.

After the issue of the writ, the plaintiffs, on 4 June 1991 obtained an *ex parte* injunction restraining, *inter alia*, the second, third, fourth, fifth and ninth defendants from dealing with or disposing of the lands in question. On 10 June 1991, the plaintiffs' solicitors wrote to solicitors for the intervener giving them notice of the injunction. There was no reply to that letter. Instead, the intervener's solicitors took out an originating summons for removal of the first and second caveats entered by the plaintiff.

On 19 August 1991, the plaintiffs wrote again to the intervener's solicitors. It is a very long letter. I will not produce it here. In gist, it gave notice of the injunction and alleged that the intervener was not a *bona fide* purchaser of the six lots.

The summons to remove the caveat was heard, by Faiza Thamby Chik J who granted an order in terms of it on 26 August 1991. Although no appeal was lodged against this order and nothing turns upon it, I think that in view of its general importance, it is necessary to digress for a moment and consider the order directing the removal of the caveats,

The Order of 26 August

Having consulted the relevant authorities, in particular the judgment of Suffian LP in *Mahadevan v. Patel* [1975] 2 MLJ 207, I am not at all sure that the order directing the removal of the second caveat was correct. I say nothing about the correctness of so much of the order that directed the removal of the first caveat. But my silence upon it must not be taken either as a disapproval or an affirmation of the decision removing it. I merely elect to say nothing about it.

Encik Das for the intervener drew our attention to the decision of the Supreme Court in *Hew Sook Ying v. Hiw Tin Hee* [1992] 2 MLJ 189 which he said was authority for the proposition that a director cum shareholder has no caveatable interest in the immovable property of his company. In fairness to Counsel, that case may well be read as supporting the proposition advanced by Counsel. *Mahadevan* (*supra*) does not appear to have been cited to the Supreme Court in *Hew Sook Ying*. I am unable to say what the decision might have been if this had been done.

Although the point does not fall for decision in the present appeal, it may become necessary for this Court at some future time to determine the circumstances, if any, in which a director or even a shareholder may be recognised as having a caveatable interest in immovable property belonging to the company. There are certainly strong reasons of policy warranting the conferment upon the director of a limited company of a caveatable interest in his company's immovable property for the limited purpose of protecting that property from being dealt with contrary to law. To state the contrary in absolute terms is to issue a licence to directors who command a majority on the board of a company to strip that company of all its landed assets in breach of their fiduciary duties. In these circumstances, a director who is in the minority on the board will not be able to prevent the defalcating directors from disposing of the company's lands save by the entry of a caveat. An injunction may not always be as effective in such cases. Similarly, the interests of the company in land belonging to a third party may be protected on the company's behalf by the entry of a caveat by a director on behalf of his company as was done in *Mahadevan* (*supra*).

Recognising that a company director has a caveatable interest in the immovable property of his company will enable him to get across the first of the three steps enumerated in *Luggage Distributors Sdn. Bhd. v. Tan Hor Teng* [1995] 2 AMR 969. But that does not mean that a company director's caveat ought, in all cases, to survive. If such a caveat is unable to surmount the other two steps referred to by this Court in *Luggage Distributors*, then, of

course, it will no doubt be removed. Viewed from this perspective, the decision in *Hew Sook Ying* is entirely justifiable on its own peculiar facts. If I am driven to resolve the apparent conflict, which Encik Das says, exists between the Federal Court in *Mahadevan* and the Supreme Court in *Hew Sook Ying*, then I must, with all the humility at my command, express my preference for the former.

The Narrative Continued

I now return to the factual narrative. On 2 October 1991, the Director of Lands and Mines rejected the six memoranda of transfers presented to him by the intervener for registration. The intervener therefore found itself in the position that it was unable to effect a registration of the six titles in its favour despite the removal of the first plaintiff's caveats. It therefore applied to intervene and to set aside the injunction granted on 4 June 1991. It was granted leave to intervene but failed to have the injunction dissolved. Later, the action then proceeded to trial and produced the result which I adverted to earlier in this judgment.

Now, I realise that I have dealt with the chronology of events in this case at some length despite a cogent summary of the facts by the learned Judge in his judgment. This has been necessitated by two factors. First, the case is one which, by its very nature, requires, if not, demands a meticulous examination of its facts. The second is the manner in which the intervener's case was presented in this appeal. And this will become obvious when I come to deal with the submissions made on its behalf. However, before I do that there is one matter of importance which calls for comment. It has to do with the way in which the plaintiffs conducted their case against the intervener.

The Conspiracy Charge

The statement of claim contains a direct challenge as to the validity of the sale of the six lots in question to the intervener. That challenge appears as a charge of conspiracy against the defendants but not - and I emphasise this - against the intervener. In respect of the latter, the averment is that it is not a *bona fide* purchaser. These allegations appear in paras. 60, 61 and 64 of the statement of claim which read as follows:

> 60. The defendants subsequently becoming aware of the 1st, 3rd and 4th plaintiffs legitimate rights to the said company and becoming aware of their nonexistent powers as shareholders and directors. The defendants wrongfully and with intent to injure the 1st, 3rd and 4th plaintiffs and each of them, conspired and agreed together by illegal and unlawful means commenced engaging lawyers property brokers and represented to the third parties that they had powers, authority to sell, deal, transfer in any manner all the said lands enumerated in para. 6 of the statement of claim belonging to the said company.
>
> 61. In pursuance of the said conspiracy the 2nd, 3rd, 4th, 5th and 9th defendants as purported directors had wrongly without legal authority entered into a certain sale and purchase agreement to sell all the lands enumerated at para. 6 of the statement of claim to a certain third party by the name of one Tan Eng Boon and Pekan Nenas Industry Sdn. Bhd. at a ridiculously low price in total disregard of the said company's interest and without the knowledge, consent and permission of the 1st plaintiff, 3rd plaintiff and 4th plaintiff who are legally directors of the said company.
>
> 64. The plaintiff contends that the purported sale of the landed properties by the 2nd, 3rd, 4th, 5th and 9th defendants is unlawful, void and is not binding on the said company and the attempt by the third parties to purchase the property is not *bona fide* and therefore not binding on the said company and plaintiffs.

Notwithstanding all this, the intervener was not joined as a party to the action. Even when the intervention took place for the limited purpose of setting aside the injunction, no steps were taken by the plaintiff to add the intervener as a co-defendant to the action. Neither did the intervener apply to have itself added as a party. There was no pleading delivered by the plaintiffs against the intervener. Neither was there any pleading delivered by the intervener. All that was placed on record was the affidavit of Dato Tan filed in support of the application to set aside the injunction. In short, every fundamental rule of practice and procedure had been flouted.

What ought to have been done in this. When the intervener was given notice of the suit and of the injunction obtained therein, its solicitors ought to have written to the plaintiffs' solicitors putting them to their election: that they either add their client as a co-defendant to the action and amend their statement of claim to raise a case against the intervener or that an application in that behalf would be made by the intervener. If the plaintiffs had demurred upon that request, then the application for intervention could and should have been made. In any event, when the application came to be made, there ought to have been a prayer in the summons asking for an order that the intervener be added as a co-defendant and for directions on the delivery of pleadings by the parties, including a direction requiring the plaintiffs to plead their case against the added co-defendant. No difficulty on this last requirement would have been encountered because there were the necessary averments in paras. 60, 61 and 64 of the statement of claim.

As far as the law governing the subject at hand is concerned, all the learning upon it is to be found in the judgment of Edgar Joseph Jr. SCJ in *Tajjul Ariffin v. Heng Cheng Hong* [1993] 2 MLJ 143, and it is sufficient for me to refer to the following passage at p. 151 of the report:

> To revert to the question of law posed at the outset, we consider that the following general principles as to parties may be distilled from the rules of Court and the authorities thereon.
>
> (1) The principle of overriding importance is that all necessary and proper parties, but no others, should be before the Court at the same time to enable the effectual and complete determination and adjudication to be made by the Court of all questions and issues between the parties which arise for decision (See O. 15 rr. 5 and 6 of the RHC.)
>
> (2) To this end, no action will be defeated by reason of mere mis-joinder or non-joinder of any party which is capable of being remedied and is no defence. (See *Abonloff v. Oppenheimer* [1882] 30 WR 430.)
>
> The joinder of parties is permitted as of right in a wide area of circumstances or otherwise with the leave of the Court. (See O. 15 r. 4 of the RHC)
>
> (3) Additionally the Court has extensive discretionary powers - to add, substitute or strike out parties who are not proper or necessary, and for these purposes the Court may even act of its own motion. (See O. 15 r. 6 of the RHC.)
>
> (4) Generally, in common law and chancery matters, a plaintiff who considers that he has a cause of action against a defendant is entitled to pursue his remedy against that defendant alone and he cannot be forced to pursue his remedy against other persons who he has no wish to sue. (See Per Wynn-Parry J in *Dollfus Mieg et Compagnie SA v. Bank of England* [1951] 1 Ch 33.)
>
> (5) Nevertheless, a person who is not a party may be added as a defendant over the objections of the plaintiff on his own intervention or upon the application of the defendant or in some cases by the Court of its own motion. (See 1 Supreme Court Practice (1991) at p. 193 para. 15/6/71)

(6) But, a defendant against whom no relief is sought by the plaintiff will generally not be added against the wishes of the latter. (See *Hood-Bars v. Frampton & Co.* [1924] WN 287) A third party notice is in such a case usually the proper procedure to adopt though such a defendant can be added in a proper case. (See *Dollfus Mieg et Compagnie SA v. Bank of England.*)

I need say no more than this. In my judgment, the present case is covered by principles 1 and 5, while it falls outside the ambit of principle 6 because of the direct challenge upon the validity of the sale to the intervener.

The intervener's complaint of the lack of a properly pleaded case against it does not appear to have come until it put in its written argument. In my judgment it came too late. The Judge dealt with it in the following passage in his judgment:

> The intervener in what I would say trying to resist the prayer sought by the plaintiffs for a declaration that the sale and purchase agreement between it and the 1st defendant company be declared null and void and of no effect relied on the doctrine that it is a *bona fide* purchaser for value and had no notice of the dispute between the shareholders/directors of the 1st defendant company, and even if it had notice it is not bound to inquire into the internal affairs of the 1st defendant company. Further, the Counsel for the intervener contended that the issue of the conspiracy of the intervener with the 2nd to 9th defendants and the intervener was not a *bona fide* purchaser could not be relied by the plaintiffs as they were not so pleaded by the plaintiffs. As the intervener was not ordered to be made a party, such contention cannot in the circumstances be accepted as no consequential action was taken under O. 15 r. 8 of RHC. **Hence it is just and proper that all evidence available should be considered by the Court in determining the claim of the intervener that it is a *bona fide* purchaser and that it had no notice of the dispute between the shareholders/directors of 1st defendant company** (Emphasis supplied).

It is clear as can be from this passage that the Judge took the proper course, and indeed, the only course open to him at that stage. It would have been too much to have expected of him to re-open the whole case and direct the proper addition of the intervener as a co-defendant and for the service of the process and pleadings upon it. It was for the intervener to have taken the point at the earliest available opportunity. But its legal advisers did not think it necessary to do so. In these circumstances, the learned Judge adopted the course best suited to the attainment of justice and no criticism may be properly directed against him on that score.

I have already emphasised the absence of any allegation in the pleaded case that the intervener was a party to the conspiracy formed between the defendants. The only allegation against the intervener, as pleaded in para. 64 of the statement of claim, was that it was not a *bona fide* purchaser of the lands in question. However, as the trial progressed, the case against the intervener was enlarged to include a charge of conspiracy. Let me illustrate.

When concluding his evidence-in-chief, Dato Tan was asked a question to which he made the following response:

> There was no conspiracy between myself and the defendants in respect of the purchase of the lands.

So, it would appear that at the close of the plaintiffs' and defendants' cases respectively, the intervener perceived that the case against him as including a charge of conspiracy. But throughout the long and searching cross-examination of Dato Tan, there was not the slightest suggestion that he had joined in the conspiratorial agreement reached among the defendants.

Indeed, the entire cross-examination of this witness would seem to have proceeded on the basis that he had acted imprudently. The following extracts from the Judge's note of the evidence confirm this:

> "I agree that it is more prudent to use account payee cheque in dealing with a limited company" - an answer given in the context of the payment for the option;
>
> "Before I signed the sale and purchase agreement, the second defendant had not removed the caveat but promised to do so. In spite of this I executed the sale and purchase agreement."
>
> **Put**: You and your solicitors did not make proper inquiry in respect of the caveat.
>
> **Answer**: I did not make a proper inquiry.

Yet, when it came to the stage of argument, the plaintiffs, in their written submission, suggested for the very first time that the intervener had been a co-conspirator. This is what they said:

> The interveners contend that they are *bona fide* purchasers for value and they had no notice of the dispute as to the shareholders and directors of Aik Ming (M) Sdn. Bhd. and even if they had notice of the internal affairs and the disputes they are not bound to inquire and not affected as they are third parties entering into a contract in good faith with the Aik Ming (M) Sdn Bhd. The interveners contend they had legally and lawfully entered into a sale and purchase agreement with Aik Ming (M) Sdn. Bhd. dated on 3 December 1990 and they are entitled to register the 6 pieces of land in their names as they have become beneficial owners of the properties.
>
> In response to the interveners contentions, we humbly submit that the interveners contention is misconceived in law, wrong, unlawful and should be completely rejected by this Honourable Court. We submit that the interveners were not *bona fide* purchasers for value of the properties and in fact all their conduct and action before their execution of the sale and purchase agreement and after the sale and purchase agreement is clear and an extreme case of *mala fides* to defraud the plaintiffs and the company Aik Ming (M) Sdn. Bhd.
>
> **The plaintiffs further contend that the interveners and the defendants especially the 2nd and 3rd defendant conspired together to defraud all the plaintiffs and Aik Ming (M) Sdn. Bhd** of the landed properties which formed the substantial assets of Aik Ming (M) Sdn. Bhd. for the following reasons. (Emphasis supplied).

Now, all this is contrary to two fundamental rules of procedural fairness that operate in the environment of private law. The first of these rules relate to the pleaded case while the second has to do with the cross-examination of witnesses.

It cannot be gainsaid that procedural law is extremely strict in cases such as this. And rightly so. For a charge of conspiracy to defraud is a serious one to make. It ought not to be countenanced by a Court unless properly taken in party's pleadings. Such a charge must be supported by full particulars. The evidence led must be in proof of the pleaded case. The standard of proof where a conspiracy to defraud is alleged (as opposed to where e.g., a conspiracy to induce the breach of a contract is alleged) is the same as where fraud is alleged. A plaintiff must prove his case beyond a reasonable doubt. Imprudence is not and ought never to be equated with dishonesty. This, then, is the first rule.

The content of the second rule may be stated thus. It is essential that a party's case be expressly put to his opponent's material witnesses when they are under cross-examination. A failure in this respect may be treated as an abandonment of the pleaded case and if a party, in the absence of valid reasons, refrains from doing so, then he may be barred from raising it in argument. It is quite wrong to think that this rule is confined to the trial of criminal causes. It applies with equal force in the trial of civil causes as well.

This rule as to cross-examination to which I have just adverted derives its name from the case in which it was expressed. It is the decision of the House of Lords in *Browne v. Dunn* [1893] 6 R 67 where Lord Herschell LC stated the principle in this way (at p. 70 of the report):

> Now, my Lords, I cannot help saying that it seems to me to be absolutely essential to the proper conduct of a cause where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact, by some questions put in cross-examination showing that that imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged and then, when it is impossible for him to explain, as perhaps he might have been able to do if such questions had been put to him, the circumstances which it is suggested indicate that the story he tells ought not to be believed, to argue that he is a witness unworthy of credit. My Lords, I have always understood that if you intend to impeach a witness you are bound, whilst he is in the box, to give him an opportunity of making any explanation which is open to him, and, as it seems to me, that is not only a rule of professional practice in the conduct of a case, but is essential to fair play and fair dealing with witnesses.

In the same case, Lord Halsbury had this to say (at p. 76 of the report):

> My Lords, with regard to the manner in which the evidence was given in this case, I cannot too heartily express my concurrence with the Lord Chancellor as to the mode in which a trial should be conducted. To my mind nothing would be more absolutely unjust than not to cross-examine witnesses upon evidence which they have given, so as to give them notice, and to give them an opportunity of explanation, and an opportunity very often to defend their own character, and, not having given them such an opportunity, to ask the jury afterwards to disbelieve what they have said, although not one question has been directed either to their credit or to the accuracy of the facts they have deposed to.

Having dealt with the evidence in that case, Lord Halsbury continued (at p. 77):

> My Lords, it seems to me that it would be a perfect outrage and violation of the proper conduct of a case at *Nisi Prius* if, after the learned Counsel had declined to cross-examine the witness upon that evidence, it is not to be taken as a fact that that witness did complain of the plaintiff's proceedings, that he did receive advice, that he went round to Mr. Dunn as a solicitor, and that he did sign that retainer, the whole case on the other side being that the retainer was a mere counterfeit proceeding and not a genuine retainer at all.

The rule in *Browne v. Dunn* has been applied by Indian Courts in the context of the Indian Evidence Act 1872, on which is based our Evidence Act 1950. I need only refer to the decision in *Carapiet v. Derderian* AIR [1961] Cal. 359, where, Mukharji J, at p. 362 of the report, expressed the principle in the following words:

> The law is clear on the subject. Wherever the opponent has declined to avail himself of the opportunity to put his essential and material case in cross-examination, it must follow that he believed that the testimony given could not be disputed at all. It is wrong to think that this is merely a technical rule of evidence. It is a rule of essential justice. It serves to prevent surprise at trial and miscarriage of justice, because it gives notice to the other side of the actual case that is going to be made when the turn of the party on whose behalf the cross-examination is being made comes to give and lead evidence by producing witnesses. It has been stated on high authority of the House of Lords that this much a Counsel is bound to do when cross-examining that he must put to each of his opponents witnesses in turn, so much of his own case as concerns that particular witness or in which that witness had any share. If he asks no question with regard to this, then he must be taken to accept the plaintiffs account in its entirety. Such failure leads to miscarriage of justice, first by springing surprise upon the party when he has finished the evidence of his witnesses and when he has no further chance to meet the new case made which was never put and secondly, because such subsequent testimony has no chance of being tested and corroborated.

Now, the principle of law laid down in these passages is to be applied to the facts of the instant appeal in the following fashion. First, we have the firm denial by Dato Tan in his evidence-in-chief of any participation in the conspiracy formed amongst the second to the ninth defendants. Then we see no challenge in his cross-examination of that firm denial. That must be taken as an acceptance by the plaintiffs of the refutation by Dato Tan in his evidence of any part in the conspiracy. Later, when it came to the stage of making submissions, the plaintiffs were not entitled to argue that Dato Tan was a co-conspirator.

It appears that the learned Judge was very much aware of the futility in so much of plaintiffs' submission that suggested the implication of Dato Tan in the conspiracy. For, apart from mentioning it *en passant*, in the passage I have reproduced earlier, he kept to the safe course of determining whether the intervener was a *bona fide* purchaser for value and whether it could take advantage of the indoor management rule established by the decision in *Royal British Bank v. Turquand* [1856] 119 E.R. 886. This comes across from a reading of his judgment as a whole and from that part in the passage of his judgment upon which I have placed emphasis. The approach taken by the learned Judge is common to the plaintiffs and the intervener. Indeed it was made by each of them in their respective written submissions.

Accordingly, at a very early stage of the hearing we informed Encik Das that we were not inclined to accept any suggestion that the intervener was a party to the conspiracy. Encik Nathan, then upon our invitation, with his customary frankness, accepted that the only issue upon which liability attracted to the intervener was its ability to show that it was a *bona fide* purchaser and came within the protective cover of the indoor management rule. With one qualification, both parties therefore stood on common ground in respect of the issues that fell for decision in this appeal. The qualification I mentioned appeared in Encik Das' submission to the effect that the mind of the learned Judge had, by reason of his reference to the charge of conspiracy in the passage in his judgment to which I have referred, been influenced by the allegation of conspiracy against the intervener. In other words, says Encik Das, the allegation that the intervener was a co-conspirator was very much in the learned Judge's mind when he came to set aside the sale of the six lots.

I would respond to Counsel's submission by stating that in fairness to the learned Judge, when his judgment is read as a whole, there is nothing in it to even remotely suggest that he had allowed his mind to be affected in any way by the suggestion that Dato Tan was a party to the conspiracy between the defendants. It is clear that he found the sale to the intervener to be unsustainable purely on the basis of its inability to take advantage of the indoor management rule because it was not a *bona fide* purchaser. Consequently, there is no merit in this part of Encik Das' argument and I have no hesitation in rejecting it.

I must now turn to deal with the submissions made in the first appeal and the other submissions made on the intervener's behalf in the second appeal.

The Submissions in the First Appeal

Cik Kannaperan made the following submissions in support of the first appeal: (1) The learned Judge was wrong in holding that the notice convening the board meeting of 17 April 1990 was invalid and that even if it was valid, it had not been served on the first, second and third plaintiffs, (2) Even if no or no proper notice of that meeting had been served, the meeting and all business conducted thereat were valid since the ultimate result would have been no different even if the plaintiffs had attended the meeting; (3) The Judge was wrong in holding that the transfers of shares that were approved at the meeting of 17 April 1990 were invalid. He had overlooked the two declarations of trust and powers of attorney executed by the

second plaintiff in favour of the third and fourth defendants when he made this finding. These transfers were done in the legitimate exercise of the powers of attorney and the deeds of trust and were therefore valid. (4) Even if the meeting of 17 April 1990 and the proceedings thereat were defective, they could and should be cured under s. 355(3)(a) of the Companies Act 1965.

I now turn to consider each of these submissions.

Submission (1): Service of Notice

I will, for a moment, put aside the complaint regarding the Judge's finding that the notice was invalid and consider the argument directed upon the issue of service.

It is not in dispute that the validity of all that transpired at the meeting of 17 April 1990, depends upon whether proper notice of that meeting had been served - I use the word "served" deliberately - upon the other members of the board by the second defendant as the secretary of the first defendant. Upon this issue the learned Judge had before him two conflicting versions: the defendants contending that there had been service of the notice and the first to the third plaintiffs contending that they had not received it.

He resolved this issue in the plaintiffs' favour in the following passage in his judgment:

> The 2nd defendant, who is also the secretary, claimed that a notice of the meeting of the board to be held on 17 April 1990 (see p. 1 of D1) was issued to all the directors. However, the 1st plaintiff (PW1), 2nd plaintiff (PW2) and 3rd plaintiff (PW3) gave evidence that each of them had not received the notice referred to.
>
> According to art. 89, the secretary shall summon a meeting of the directors by notice served upon the several directors. Article 107 states 'Any notice sent by post shall be deemed to have been served on the day after the envelope or wrappers containing the same is posted and in proving such service it shall be sufficient to prove that the envelope or wrappers containing the notice was properly addressed and put in the post office box'.
>
> PW1, PW2 and PW3, who were the directors at the material time in their evidence denied receipt of the notice and the agenda (see p. 2 of D1) whereas DW2 gave evidence that he did receive the notice and the agenda (pp. 1 and 2 of D1). DW2 stopped there without producing the relevant documents to show that the notice and the agenda were in fact issued and sent to the directors for the meeting on 17 April 1990. If the notice and the agenda had been sent to all the directors, I am of the view that there could be no reasons for PW1, PW2, and PW3 not to attend the board meeting in view of the agenda to be discussed and passed at the board's meeting. In fact, it is the more reason for PW1, PW2 and PW3 to attend the said board meeting as they could very well defeat the resolutions proposed thereat in view of their majority shareholding in the 1st defendant company at the material time. In view of the denial of the receipt of the notice and the agenda by PW1, PW2 and PW3, and I do not see any good reasons to disbelieve them, it is for the defendants to show that such notice and agenda were served on PW1, PW2 and PW3. In fact the defendants failed to so prove and interestingly enough their Counsel did not press hard on this issue when cross-examining PW1, PW2 and PW3.

With respect to Counsel, I am unable to detect any error of reasoning in the foregoing passage. It cannot be gainsaid that the persons who were to be most affected in an adverse fashion by the business that was intended to be transacted at the board meeting in question were the first, second and third plaintiffs. It was entirely in their interest to attend that meeting. Had they done so, there is no doubt that the intended resolution would have never carried because they formed, as the board was then constituted, the majority. I am unable to believe that, in the circumstances that existed in April 1990, the first plaintiff would have thrown his

hands up in abject surrender on receipt of the notice and the agenda. As I have said, he was a man who treated the first defendant company as a firm of which he was the sole proprietor and I am certain that it would have been in his nature to ward off any attempt to unseat him from the control he wielded. Therefore, I am, quite apart from the Judge's own belief of the plaintiffs' witnesses and independent of his own reasoning, inclined to believe their testimony as it appears in the printed record. I find their evidence to entirely accord with the probabilities of the case.

It must not be forgotten that the determination of the issue now under consideration is a pure question of fact turning upon the credibility of witnesses whom the trial Judge had had the advantage of visual assessment. The approach of an appellate Court upon such a matter is well settled and has been expressed in a number of decisions and I think that it is appropriate to quote from two of them. The first is the decision of the House of Lords in *Clarke v. Edinburgh Tramways Co.* [1919] SC (HL) 35 where, at p. 36, Lord Shaw had this to say:

> **When a Judge hears and sees witnesses and makes a conclusion or inference with regard to what on balance is the weight of their evidence, that judgment is entitled to great respect, and that quite irrespective of whether the Judge makes any observations with regard to credibility or not.** I can of course quite understand a Court of Appeal that says that it will not interfere in a case in which the Judge has announced as part of his judgment that he believes one set of witnesses, having seen them and heard them, and does not believe another. But that is not the ordinary case of a cause in a Court of justice. In Courts of justice in the ordinary case things are much more evenly divided; witnesses without any conscious bias towards a conclusion may have in their demeanor, in their manner, in their hesitation, in the nuance of their expressions, in even the turns of the eyelid, left an impression upon the man who saw and heard them which can never be reproduced in the printed page. What in such circumstances, thus psychologically put, is the duty of an appellate Court? In my opinion, the duty of an appellate Court in those circumstances is for each Judge of it to put to himself, as I now do in this case, the question, Am I - who sit here without those advantages, sometimes broad and sometimes subtle, which are the privilege of the Judge who heard and tried the case - in a position, not having those privileges, to come to clear conclusion that the Judge who had them was plainly wrong? If I cannot be satisfied in my own mind that the Judge with those privileges was plainly wrong, then it appears to me to be my duty to defer to his judgment. (Emphasis supplied).

The second case from which it is, I think, appropriate to quote is *Seng Heng Electrical v. Chua Len Teng* [1970] 1 MLJ 67 where Ong Hock Thye CJ (Malaya), when dealing with a case in which the High Court had reversed a Magistrate on appeal, said this:

> In the result, after considering the conflict of evidence regarding certain documents, the Judge came to the conclusion that 'on the preponderance of evidence the learned Magistrate was wrong in coming to the conclusion that there was an oral agreement between the respondents and the appellant'.
>
> With respect, we do not think that he was justified in substituting his own opinion for that of the Magistrate 'where the credibility or reliability of one or more witnesses has been in dispute, and where a decision on these matters has led the trial Judge to come to his decision as a whole': see *Benmax v. Austin Motor Co. Ltd.* [1955] AC 370, per Lord Reid. Citing *Thomas v. Thomas* [1947] AC 484 his Lordship recalled this passage from the speech of Lord Thankerton:
>
> > Where a question of fact has been tried by a Judge without a jury, and there is no question of misdirection of himself by the Judge, an appellate Court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it

> is satisfied that any advantage enjoyed by the trial Judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial Judge's conclusion.

In reliance of these authorities and for the reasons which I have given, I have no difficulty in rejecting this part of the first submission of Cik Kannaperan.

I now turn to deal with complaint that is directed against the finding by the Judge that the notice convening the meeting of 17 April 1990 was invalid. This is what the learned Judge said about it:

> Quite apart from the non-receipt of the said notice by PW1, PW2 and PW3, a look at the notice as on p. 1 of D1 clearly showed that the notice was not dated and signed by the secretary (i.e. DW3). Neither was the signature even printed as provided by art. 110. According to DW3, she did sign and put a date on the said notice and the notice as in p. 1 of D1 was a file copy only and it was not signed and dated or even printed. Apart from her oral explanation she did not adduce any other evidence to support her oral explanation about the notice (p. 1 of D1) that was undated and unsigned. Now the question for me to consider is whether her explanation can be accepted by the Court.It is clear by art. 110 (p. 10 of P3) that the signature to any notice to be given by the 1st defendant company may be written or printed. I am of the view that it is rather difficult to accept her oral explanation as it would appear to be rather odd for her to sign on all the copies except the file copy! In fact she
>
> needed only to print her name on the file copy of the notice to meet the requirement of art. 110. In the circumstances the notice at p. 1 of D1 could not, in my view, constitute a proper notice. However, even assuming that the notice was duly dated and signed as claimed by DW3 , the next issue I have to consider is whether the notice had been duly served on all the directors.

Counsel submits that the learned Judge's evaluation of the evidence is wrong because it is perfectly natural for the second defendant not to have signed the file copy. I am neither able to agree with the submission of Counsel nor am I able to find any fault in the reasoning of the learned Judge on this point. As to the second defendant's explanation for the absence of her signature on the file copy, this is again a matter which is dependent upon the impression made upon the mind of the Judge who saw and heard the witness. I am satisfied that his rejection of the second defendant's explanation to be an entirely proper judicial appreciation of her evidence. As such I find the submission of Counsel on this point to be devoid of any merit and I unhesitatingly reject it.

Submission (2): Validity of the Meeting

The essence of Cik Kannaperan's second submission is that the meeting of directors on 17 April 1990 was not invalidated by the failure to give a proper notice of it. She says that it would have made no difference even if no notice was given. Let me take the second of these points as the first.

To say that no difference would have been occasioned by a failure to notify the first, second and third plaintiffs of that all important meeting is to imitate Nelson at Trafalgar. To recall, prior to the changes made to the constitution of the first defendant's board, the first, second, and third plaintiffs formed the majority on the board. The other two directors were the second and third defendants. It does not require much imagination to realise the fate the proposed resolutions would have met had they attended the meeting. There can be no doubt that the votes of the plaintiffs would have, without difficulty, prevailed over those of the defendants and therefore there would have been a material difference in the event that the plaintiffs had been notified of the meeting. Accordingly, there is no merit in this argument of the defendants.

I now turn to consider the more formidable argument that the defendants' failure to give notice did not have the effect of invalidating the board meeting. In support of her argument, Cik Kannaperan cited two decisions, namely, *Bentley-Stevens v. Jones* [1974] 1 WLR 638 and *Dr. Mahesan & Ors. v. Ponnusamy & Ors.* [1994] 3 MLJ 312.

In the former, the following passage in the judgment of Plowman J, at p. 640 of the report, was read to this Court:

> The plaintiffs case is first of all that proper notice of the board meeting of Holdings on Monday, 28 January 1974, was not given, with the consequence that the proceedings of that meeting, and everything that flowed from them, were invalid.
>
> Secondly, it was submitted on behalf of the plaintiff that even if sufficient notice of the meeting was given, a board meeting of the defendant company was necessary before an extraordinary general meeting of that company could be validly convened, and no such meeting was even held, with the consequence that the extraordinary general meeting was not properly convened and its proceedings were therefore a nullity.
>
> Alternatively, Mr. Heyman, on behalf of the plaintiff, submitted that this was what is popularly known as a 'quasi-partnership' case and that on the principles enunciated by the House of Lords in *In re Westbourne Galleries Ltd.* [1973] AC 360 the Court should restrain the first and second defendants, as two of the three partners in the quasi-partnership, from expelling the third partner, namely the plaintiff.
>
> I will deal with the first and second submissions together. In my judgment, even assuming that the plaintiff's complaint of irregularities is correct, this is not a case in which an interlocutory injunction ought to be granted. **I say that for the reason that the irregularities can all be cured by going through the proper processes and the ultimate result would inevitably be the same.** In *Browne v. La Trinidad* [1887] 37 Ch.D. 1, 17, Lindley LJ said:
>
> > I think it is most important that the Court should hold fast to the rule upon which it has always acted, not to interfere for the purpose of forcing companies to conduct their business according to the strictest rules, where the irregularity complained of can be set right at any moment.
>
> It seems to me that the motion which is before me falls within the principle stated by Lindley LJ (Emphasis supplied.)

In the latter case, Zakaria Yatim J (as he then was) undertook a careful review of several authorities upon the subject. I shall therefore quote from his judgment at length:

> Mr. Thangaraj submitted that the notice of the board meeting dated 14 April 1994 did not give sufficient time to Dr. Mahesan and Dr. Ampikai to attend the meeting. He said that the law requires that sufficient time be given for notice of meeting of board of directors. He cited a number of authorities in support of his submission.
>
> Mr. CK Ong, Counsel for the defendants submitted that on the question of the notice of the board meeting dated 14 April 1994, the Court had to decide: (a) whether the notice was given to the plaintiffs; (b) if the notice was given to the plaintiffs, whether it provided sufficient time for the plaintiffs to attend the meeting; (c) whether the notice provided details as to the nature of the business to be transacted; and (d) whether a written agenda is necessary in law to be given to the directors. He too cited a number of authorities.
>
> I shall now examine the position in law whether the plaintiffs were given sufficient time to attend the board meeting on 25 April 1994. **The memorandum and articles of the company are silent on the issue of notice of meeting of directors.** The Companies Act 1965, too is silent on this point. It is therefore necessary to examine the position at common law. According to RR Pennington, *Company Law* (6th Edn.) at p. 575:

> Notice of board meetings should be given to all the directors in sufficient time to enable them to attend. What is sufficient notice depends on the facts at the time ...

In *Re Homer District Consolidated Gold Mines* [1888] 39 Ch D 546, the meeting of board of directors was held at 2 o'clock, two of the directors were given a few hours' notice and they did not attend. One of them received the notice the next day. The other gave notice that he could not attend till three o'clock. The fifth director was abroad and no notice was sent to him. The Court decided that the service of the notice of the meeting was bad and the decisions of the board in the absence of the directors were void.

In *Browne v. La Trinidad* [1888] 37 Ch D 1, the facts as stated in the headnotes are as follows:

> A meeting of directors passed a resolution to summon an extraordinary general meeting at which were to be proposed special resolutions for removing B from the office of director, and for increasing the capital. The articles gave power to remove directors by special resolution. The only notice B had of the board meeting was a notice given less than ten minutes before the time of holding it, and not stating the nature of the business. The notices for the general meeting were issued, and four days before the time for the meeting B, **who up to that time had made no complaint of the short notice,** brought his action to restrain the company from holding the meeting, on the ground that the board which summoned it was not duly constituted, as B had not received proper notice and could not attend. The general meeting was held and passed the resolutions. Charles J... granted an injunction restraining the company from confirming the resolution to remove B.

The Court of Appeal decided that the injunction ought not to have been granted. In his judgment at pp. 16-18, Lindley LJ said:

> The power of the board to convene a meeting of the shareholders is contained in cl. 56 of the articles, and runs thus: 'The directors may, whenever they think fit, call an extraordinary meeting,' and then it provides that they shall be bound to do so upon such requisition as therein mentioned. 'The directors may whenever they think fit.' That means, I apprehend, that the directors may do it at a meeting properly convened. I do not think it means that any directors may without consulting the others call an extraordinary meeting. I think that, so far, Mr. Marten's argument is right, and **if the plaintiff had complained that the meeting of directors convened at such a short notice was not duly convened, and had sought the interference of the Court to prevent the directors from acting on a resolution passed at it, I can understand that he would have had a plausible case. But he did nothing of the kind. He took no notice of the matter. He did not say that it was inconvenient for him to attend, and he did not ask the directors to adjourn it. He does nothing at all until this notice convening the extraordinary meeting has been issued and circulated, nor until four days before the meeting.** His contention now is that what he calls this irregularity in serving the notice upon him, renders it incompetent for the shareholders to pass the resolution to consider which they have had notice to meet. It appears to me that, if we gave effect to such an argument as this, we should be paralysing the whole course of business of these companies. It is competent for directors to call meetings, it is competent for shareholders to pass resolutions, and the most that can be said here is that there is or may be some irregularity, but an irregularity (if such it be) which can be cured at any moment. In such cases the Court never interferes. I think it is most important that the Court should hold fast to the rule upon which it has always acted, not to interfere for the purpose of forcing companies to conduct their business according to the strictest rules, where the irregularity complained of can be set right at any moment. I am not at all sure, having regard to the mode in which, and the short notice upon which, those meetings of directors were held, that this gentlemen could have complained of this meeting of

directors as irregular, but I will assume that he could. **If, at the time of receiving the notice of the board meeting, he had said to the secretary that he could not attend as the notice was too short, he might have had some case.** I am not prepared, however, to say that in consequence of the shortness of that notice the shareholders were incompetent to pass the special resolution they were convened to consider. If they confirm it tomorrow it appears to me that their doing so will be entirely valid and I am of opinion that this injunction ought not to have been granted.

It is to be noted that in *Browne v. La Trinidad*, the plaintiff did not complain that the meeting was convened at such a short notice, he did not even say that it was inconvenient for him to attend the meeting neither did he ask that the meeting be adjourned. The Court of appeal decided that the meeting was not irregular and set aside the injunction grant by Charles J.

In *Bentley-Stevens v. Jones & Ors.* [1974] 2 All ER 653; [1974] 1 WLR 638, the facts were that the plaintiff happened to be away from home for the weekend and did not receive the notice of meeting until 9 o'clock on the Monday evening when he got back. Nor did he receive a telephone call which the first defendant made to him or tried to make to him on the Sunday because there was nobody there to answer the telephone. By Monday evening when the plaintiff received the notice, the meeting was already held at 9.30 in the morning and a resolution was passed to remove him as a director. Plowman J decided that this was only an irregularity which could be cured. He relied on *Browne v. La Trinidad* [1888] 37 Ch D 1.

In *Re Portuguese Consolidated Copper Mines Ltd.* [1889] 42 Ch 160, **the directors had no notice of the meeting** and the Court decided that the meeting was invalid.

In *La Compagnie de Mayville v. Whitley*, [1896] 1 Ch 788, the facts were that S received a notice that a board meeting would be held on 24 February. On 24 February, S did not attend. S then sought a declaration that the resolution of 24 February were void but the Court of Appeal held that the resolutions of 24 February were valid.

From the cases cited above, it is clear that where a few hours' notice is given for a board meeting and two of the directors are not able to attend the meeting due to the short notice, or where no notice is given because the director is abroad, a meeting held pursuant to that notice is void. But if the directors who receive the short notice of meeting make no objections to the short notice or make no request that the meeting be adjourned to another date, such meeting is valid. Where the notice of meeting does not reach the directors because they are abroad, the meeting is only an irregularity which can be set right at any moment. In order to determine whether sufficient notice is given to directors, the Court has to examine the previous practice of the board of directors in calling the meeting. In *Homer's* case [1888] 39 Ch D 546, the few hours notice had never been previously given in the history of the company.

Where the memorandum and articles expressly specify the duration of the notice of meeting of the board of directors, the board must strictly comply with that rule. Non-compliance with that rule will render the meeting ineffective and the resolutions passed at the meeting invalid. See *First Nominee (Pte) Ltd. v. New Kok Ann Realty Sdn. Bhd. & Anor.* [1983] 2 MLJ 76. (Emphasis supplied.)

I apprehend that the answer to the defendants submission is to be found in those passages in the judgments of Plowman and Zakaria Yatim JJ and Lindley LJ upon which I have placed emphasis. In summary, the proposition contended for does not apply because:

Firstly, this is not a case where insufficient notice of a meeting was given. It is a case in which **no** notice whatsoever was given. This is not a case of a mere irregularity but of a nullity. I must add that if I had been asked to read the judgment of Lindley LJ in *Browne v. La Trinidad* (*supra*), which was relied upon in both cases cited by Counsel, as classifying a case such as the present as a mere irregularity, then I would have reluctantly, and with all the respect that is due to that most learned Judge, expressed my dissent upon the proposition advanced. How can it ever be said that a director's removal at a meeting of which notice to

him is withheld is a mere irregularity? When the question is put in this way, it seems clear to me that the proposition contended for falls so short of our own standards and concepts of corporate fairness that I find it entirely unacceptable. However, I am relieved to realise that I need not place myself on a collision course with Lindley LJ since all that one needs to do is to recognise that relief to Browne was principally denied at an interlocutory level on the ground that his conduct amounted to an acquiescence of the wrong done to him; and

Secondly, this is a case in which the plaintiffs, as at the date of the impugned meeting, not only had a preponderance of voting power on the board but also on the floor of any general meeting that may have been convened at the material time;

Whilst particular cases may be distinguished upon their special facts, I take the proposition to be well settled that, unless the articles of a company provide to the contrary, no meeting of a board is valid unless reasonable notice of it and the relevant agenda that is to be discussed at it is given to the directors. *Young v. Ladies Imperial Club Ltd.* [1920] 2 KB 523 is authority for that proposition. In that case it was held:

that where a special meeting of a committee or any other body has to be specially convened for a particular purpose, every member of that body ought to have notice of and a summons to the meeting, and accordingly the omission to summon one member of a committee and the fact that the notice did not state the object of the meeting with sufficient particularity vitiated the proceedings of that body.

(per Abdoolcader J in *Public Prosecutor v. Dato Harun & Ors.* [1977] 1 MLJ 180 at p. 189).

Although all three members of the English Court of Appeal (comprising Lord Sterndale MR, Warrington LJ and Scrutton LJ) delivered separate judgments, I think it sufficient if I quote from the judgment of the Master of the Rolls at pp. 527-528 of the report. This is what he said:

I cannot entertain any doubt that, with certain very limited exceptions where a special meeting of a committee or any other body has to be specially convened for a particular purpose, every member of that body ought to have notice of and a summons to the meeting. It seems to me that is quite clearly laid down in *Smyth v. Darley* 2 HLC 789, 803, where Lord Campbell says: 'The election' - and you may read 'expulsion' for 'election'; exactly the same principle applies - 'being by a definite body on a day of which, till summons, the electors had no notice, they were all entitled to be specially summoned, and, if there was any omission to summon any of them, unless they all happened to be present, or unless those not summoned were beyond summoning distance - as, for instance, abroad - there could not be a good electoral assembly.' And in the same way in *Portuguese Consolidated Copper Mines* 42 Ch D 160, 167 Lord Esher says this: 'I will assume that every point taken by Mr. Rigby and Mr. Buckley ought to be decided in their favour except one. That one is this, that according to their own argument it is necessary that all the directors should have had notice of the meeting of the 24th.' That was on general principles I think, and not any special provision in the articles that notice should be sent to every member. 'If they had not, then the meeting of the 24th was no valid meeting, and being an invalid meeting could not adjourn itself to the 26th.' Therefore as to the general principle, I think, there can be no question. If the absent member of the body is at such a distance that it is physically impossible for him to attend in obedience to a summons, then the convener of the meeting is excused from sending the notice to that member, and without any such notice to him the meeting of the body will be properly convened. I incline to think, but I do not express any very definite opinion, that the same exception would probably be held good where it was undoubted that a member of the body was so dangerously ill that it was impossible for him to be moved, even although he might not be at a distance; and in *In re Portuguese Consolidated Copper Mines*, it is also, I think, decided that a person who ought to be summoned cannot dispense the convener of the meeting from summoning him by saying 'I shall not be able to come; you need not summon me.' There the director had gone to Ireland, and said he should be in Ireland. It was pointed out

a that Ireland is not inaccessible by post, nor is England inaccessible from Ireland if the director thought fit to come back from Ireland and attend the meeting. I do not know of any other exception.

I pause to note that the decision in *Young* does not appear to have been brought to the attention of Plowman J in *Bentley-Stevens* nor to Zakaria Yatim J in *Dr. Mahesan.* It is difficult, if not impossible, to predict what the decisions in these two cases may have been if that b had been done.

In arriving at my conclusions upon the matter at hand I have derived considerable support from the judgment of my learned brother V.C. George JCA in *Chan Choon Ming v. Low Poh Choon & Ors.* [1995] 1 CLJ 812, 814 where he said:

c The directors are the primary organ of a company. They have powers conferred on them to manage the company. These powers are conferred upon the directors collectively as a board. *Prima facie,* they can be exercised only at a board meeting of which due notice has been given and at which a quorum is present. And although majority decision prevails, it is trite that a meeting of the majority without notice to the minority is ineffective - *Re Portugese Copper Mines* [1889] 42 Ch D 160 *Young v. Ladies Imperial Club* [1920] 2 KB 523. The exception to this, not relevant here, is that if all the directors are present and consciously made a decision, that decision will not be ineffective simply because formal notice was not given - *Swiss Screens* d *(Australia) Pty. Ltd. v. Borgess* [1987] 11 ACLR 756, 758.

Useful reference may also be had to *Mitropolous v. The Greek Orthodox Church and Community of Marrickville & District Ltd.* [1993] 10 ACSR 135.

Given the finding of fact by the learned Judge that the notice convening the meeting of 17 April 1990 was not served on the plaintiffs - a finding that I accept as being entirely proper e - and having regard to the true principle of law that is to be applied, I am satisfied that the conclusion reached by the learned Judge, namely that the meeting and all the business conducted thereat were utterly void, is correct. It follows that the submission by Counsel on this point is unacceptable. The business conducted at the subsequent meetings of the first defendant's board are dependent for their validity upon the propriety of the meeting of 17 April 1990. That meeting having failed to stand up to curial scrutiny, these later meetings f are also void and useless and the learned Judge was right in so holding.

I now turn to consider the third submission made by the defendants.

Submission (3): The Trust Point

As noted earlier, Cik Kannaperan's argument here is based upon the two powers of attorney g and the even dated deeds of trust, all of which I have referred to when reciting the facts.

Now, it emerged at the trial, as part of the defendants' case, that the 11,658 shares of which the second plaintiff was the registered owner were never intended to be her property. Neither was her directorship of the first defendant meant to amount to anything at all. This is how the third defendant described it in the course of his evidence-in-chief:

h The 2nd plaintiff held the shares in trust for me and my brother as we needed two Malaysian directors and she would be considered as one and the other reason is being a Malaysian company owning properties in Malaysia. I was led to believe that the majority of the shares would be belonging to Malaysians. 2nd plaintiff got involved in the company as she was a labourer earning RM20 per day.

Additionally, when the second plaintiff was under cross-examination, it was specifically put i to her that she had been elected as a director by virtue of she being a Malaysian.

Now, I say with all due respect that those having conduct of this matter for the defendants did not sufficiently address their minds to the serious implications consequent upon the stand taken by their clients. In fairness to them, the matter does not appear to have had any impact upon the minds of those having conduct of the plaintiff's case either; for otherwise they would no doubt have pursued it to its natural and logical conclusion.

The point is this. It was intended by the defendants that the Registrar of Companies should be misled into believing, on the face of the statutory documents lodged with him, that the second plaintiff was the true beneficial owner of the shares in question and a director of the first defendant. So too would members of the public who made a search at the office of the Registrar be misled. The truth, of course lay elsewhere.

Since the truth lay elsewhere, the question, then, is whether these deeds of trust and powers of attorney are worth the paper on which they are written. I think that they are not. They were part of a scheme or device to perpetrate a fraud upon the public administration. For that reason they are plainly tainted with illegality, void and worthless. The law has come across such arrangements before and it has almost always struck them down.

In *Suntoso Jacob v. Kong Miao Ming* [1986] 2 MLJ 170, which I drew to the attention of Counsel during her argument, the plaintiff, an Indonesian National, brought an action, *inter alia*, for a declaration that the defendant, a Singaporean, was not entitled to certain shares in a company of which he was the registered shareholder. The plaintiff claimed that these shares were held by the defendant in trust and were to be transferred and dealt with in accordance with the former's directions. The defendant denied a trust and pleaded that the shares had been sold to him. The company in which these shares were held owned a vessel which had been registered with the Registrar of Ships according to whose guidelines, as they then were, ships owned by companies controlled by foreigners could not be registered. The plaintiff, who had initially owned the shares in question, had transferred them to the defendant to create an impression in the mind of the Registrar that the vessel was owned by a company, the shares of which were predominantly owned by Singaporeans. The High Court dismissed the suit. The plaintiff appealed and, argued, *inter alia*, that the Registrar's guidelines were *ultra vires* the Merchant Shipping Act. The Court of Appeal of Singapore dismissed the appeal. Among the authorities referred to by Thean J (as he then was) in the course of his judgment is the following passage in the opinion of Lord Denning in *Chettiar v. Chettiar* [1962] MLJ 143, at p. 145:

> In these circumstances it was essential for the father to put forward a convincing explanation why the transfer took the form it did: and the explanation that he gave disclosed that he made the transfer for a fraudulent purpose, namely, to deceive the public administration into thinking that he only held 99 acres of land and his son 40 acres, whereas in truth he himself meant to hold the whole 139 acres. Once this disclosure was made by the father, the Courts were bound to take notice of it, even though the son had not pleaded it: see *Scott v. Brown, Doering, McNab & Co.* [1892] 2 QB 724.

Of the argument that the Registrar's guidelines were *ultra vires* the statute, Thean J said:

> The short answer to this is that even if the guidelines were *ultra vires*, the appellant was nevertheless not justified in resorting to a deception to achieve his end. We agree entirely with the view of the learned Judge that in such an event he ought to have pursued his legal remedies by an appropriate procedure.

For the reasons thus far expressed, I am of the opinion that Cik Kannaperan's criticism of the learned Judge, namely, that he failed to have any regard whatsoever to the trust issue and the powers of attorney when he came to consider the validity of the acts done at the

impugned meeting of the board of the first defendant held on 17 April 1990, is without merit. In my judgment, the learned Judge committed no error in giving these issues a wide berth because the documents relied upon by the defendants are, in any event, nothing more than useless pieces of paper and the trust was, as I have already pointed out utterly illegal and void.

Submission (4): The Application for Validation

The fourth submission of Cik Kannaperan rests on the Judge's refusal to act under s. 355(3)(a) of the Companies Act 1965 and to validate the business that was transacted at the board meeting of 17 April 1990. Section 355 in its entirety reads as follows:

> 355(1) No proceeding under this Act shall be invalidated by any defect, irregularity or deficiency of notice or time unless the Court is of opinion that substantial injustice has been or may be caused thereby which cannot be remedied by any order of the Court.
>
> (2) The Court may if it thinks fit make an order declaring that the proceeding is valid notwithstanding any such defect irregularity or deficiency.
>
> (3) Without affecting the generality of sub-section (1) and sub-section (2) or of any other provision of this Act, where any omission, defect, error or irregularity (including the absence of a quorum at any meeting of the company or of the directors) has occurred in the management or administration of a company whereby any breach of this Act has occurred, or whereby there has been default in the observance of the memorandum or articles of the company or whereby any proceedings at or in connection with any meeting of the company or of the directors thereof or any assemblage purporting to be such a meeting have been rendered ineffective including the failure to make or lodge any declaration of solvency pursuant to s. 257, the Court:
>
> (a) may, either of its own motion or on the application of any interested person, make such order as it thinks fit to rectify or cause to be rectified or to negative or modify or cause to be modified the consequences in law of any such omission, defect, error or irregularity, or to validate any act, matter or thing rendered or alleged to have been rendered invalid by or as a result of any such omission defect error or irregularity;
>
> (b) shall before making any such order satisfy itself that such an order would not do injustice to the company or to any member or creditor thereof;
>
> (c) where any such order is made, may give such ancillary or consequential directions as it thinks fit; and
>
> (d) may determine what notice or summons is to be given to other persons of the intention to make any such application or of the intention to make such an order, and whether and how it should be given or served and whether it should be advertised in any newspaper.
>
> (4) The Court (whether the company is in process of being wound up or not) may enlarge or abridge any time for doing any act or taking any proceeding allowed or limited by this Act upon such terms (if any) as the justice of the case may require and any such enlargement may be ordered although the application for the same is not made until after the time originally allowed or limited.

The learned Judge declined to exercise the discretion conferred upon him by s. 355(3)(a) and gave the following reasons for his refusal:

> As I am of the view that the notice was undated and unsigned and for that matter not even printed, it cannot therefore constitute a valid notice and further held that the notice and the agenda were not received by PW1, PW2 and PW3, it follows therefore that the board of directors meeting on 17 April 1990 was ineffective and the resolutions passed were invalid.

However, power is given to the Court to make a validating order in respect of such irregularities under s. 355 of the Companies Act 1965 either on the application of the defendants or on its own motion. There has been no such application by the defendants. The next question is whether the Court on its own motion should exercise such power. The absence of proper notice and in any event the non-receipt of it by PW1, PW2 and PW3 in this case that resulted in the passing of resolutions to the prejudice of PW1, PW2 and PW3 to my mind caused injustice to them and in the circumstances it is not proper for the Court to make a validating order and hence I decline to make such an order. (See *First Nominee (Pte) Ltd. v. New Kok Ann Realty Sdn. Bhd. & Anor.* [1983] 2 MLJ 76).

Now it is clear that the section looks to the justice of a particular case: it is not concerned with the question whether prejudice would result in the making of a validation order. (See *Re Australian Continental Resources Ltd.* 1 ACLR 405). Where the justice of the instant case lay and how discretion should be exercised is a matter eminently within the province of the learned Judge. For it must not be forgotten that the section vests the original discretion in the High Court and that the initial function of this Court is one of review only. An appellant must therefore demonstrate that a Judge has committed one or more of those errors which permits the Court of Appeal to exercise a discretion of its own. Having regard to the findings of fact the Judge made, and having regard to the way in which he approached the determination as to where the justice of the case lay, I am convinced that the defendants have failed to discharge this onus.

Conclusion on First Appeal

It is for the foregoing reasons that the first appeal fails and was dismissed with costs.

I now turn to address my mind to the submissions made by the intervener in support of the second appeal.

Submissions in the Second Appeal

Encik Das began by reminding this Court that his appeal was much different from the first appeal. He said that the failure of the first appeal caused the defendants no loss because the lands continue to remain in the first defendant of which the second to the ninth defendants are shareholders. However, in the case of his client, substantial loss would result because it had paid RM4.8 million in full for the purchase of the land. Although I am grateful for the reminder, I think that Encik Das ought not to have troubled himself as this Court is very conscious about the difference alluded to.

I think that no injustice is done to the intervener if the submissions made in support of the second appeal are summarised as follows:

(1) The intervener as an outsider *vis a vis* the first defendant is entitled to the benefit of the rule in *Turquand*. In particular the intervener dealt with those persons in the first defendant who were its principal and most important directors as disclosed in the first defendant's public documents, including the return in Form 49 prescribed by the Companies Regulations 1966. It was not concerned with the internal squabbles within the first defendant's corporate structure.

The cases in which the benefit or protection of the rule in *Turquand* is withheld from an outsider ("the first category") are those in which the company or its assets are put at risk in a transaction in which the company has no interest. In other cases of normal commercial transactions ("the second category"), such as the sale of the company's assets, the Court will apply the rule and uphold the transaction. The only case that

does not accord with the bifurcation is *Morris v. Kanssen* [1946] AC 459, but it is a decision that must be confined to its own peculiar facts. The intervener's case comes within the second category and not the first;

(2) The transaction that the intervener entered into with the first defendant was a normal sale and purchase agreement containing the terms that such documents usually contain. There was nothing in the agreement of 3 December 1990 or in the way in which the transaction was carried out that would have excited the suspicions of a reasonable man similarly circumstanced as the intervener. In all aspects of the transaction the intervener acted upon the advice of a solicitor: both parties to the transaction had separate legal representation, the documents in respect thereof were prepared by and exchanged between solicitors. All monies due and payable under the transaction were paid through solicitors;

(3) For the same factual reasons aforesaid, the intervener is a *bona fide* purchaser who paid his money to the first defendant company with no notice of any adverse claim to the lands in question. The caveats entered by the first plaintiff were of no consequence because they were, as predicted by the intervener's solicitors, ultimately removed. The intervener, having paid the full purchase price of RM4.8 million, is entitled to have the transfers in its favour registered.

I do not, at this stage, propose to set out the arguments of Encik Nathan in response to the appeal of Encik Das' final reply to those arguments. Suffice to say that during his closing address Encik Das, in answer to a question put by me, agreed that the divergence of opinion between the parties lay upon the approach that is to be taken in the assessment of the several items of evidence on the record. On the one side we have Encik Das contending that each item of the evidence should be looked upon separately, and, when this is done, it discloses that his client was an innocent purchaser for value. On the other side we have Encik Nathan contending that the items of circumstantial evidence ought not to be examined individually but in totality, and he submits that when such an approach is adopted, it shows that the intervener was anything but a *bona fide* purchaser.

The Approach to the Evaluation of Evidence

Now, despite the erudition of Counsel of the intervener and the citation by him of copious authorities, I think that the intervener's appeal really turns upon its state of mind - in reality the state of Dato Tan's mind - at the relevant time. It is a question of fact which has to be determined from the totality of the circumstances of the case. Indeed it is a matter that depends upon the opinion created in the mind of the trier of fact who has had the advantage of seeing and hearing the witnesses who gave evidence before him - I prefer the expression "audio-visual advantage" - and to whom the law entrusts the primary evaluation of evidence. An appellate Court is not to lightly differ from the view expressed by a trial Judge upon the credibility of the evidence he has recorded.

When arguments on the second appeal were being presented, I could not help but recall to mind words spoken by distinguished Judges on two different occasions about the evaluation of circumstantial evidence, but in the context of discharging a much higher standard of proof:

> In his summing-up the learned trial Judge dealt comprehensively with all the evidence. He was careful to warn the jury that they were not bound to follow any opinion he might express. In his remarks to them at the end of the prosecution case he had this to say:
>
> > With regard to the definition of circumstantial evidence I can give you no better definition than quote to you the words of Lord Cairns in the case of *Belhaven & Stenton Peerage* reported in 1875 - 6 Appeal Cases, p. 279:

My Lords, in dealing with circumstantial evidence we have to consider the weight which is to be given to the united force of all the circumstances put together. You may have a ray of light so feeble that by itself it will do little to elucidate a dark corner. But on the other hand you may have a number of rays, each of them insufficient, but all converging and brought to bear upon the same point, and when united, producing a body of illumination which will clear away the darkness which you are endeavouring to dispel.

In other words circumstantial evidence consists of this: that when you look at all the surrounding circumstances, you find such a series of undesigned, unexpected coincidences that, as a reasonable person, you find your judgment is compelled to one conclusion. If the circumstantial evidence is such as to fall short of that standard, if it does not satisfy that test, if it leaves gaps then it is of no use at all. As I have stated this case depends entirely upon circumstantial evidence'.

(per Hill Ag. CJ in *Idris v. Public Prosecutor* [1960] MLJ 296, 297):

In the first place we have listened to a careful, accurate and detailed analysis of the evidence against the appellant. That evidence was entirely circumstantial and what the criticism of it amounts to is this, that no single piece of that evidence is strong enough to sustain the convictions. That is very true. It must, however, be borne in mind that in cases like this where the evidence is wholly circumstantial what has to be considered is not, only the strength of each individual strand of evidence but also the combined strength of these strands when twisted together to make a rope. The real question is: is that rope strong enough to hang the prisoner? (per Thomson CJ in *Chan Chwen Kong v. PP* [1962] MLJ 307).

In the light of these pronouncements, I have no hesitation whatsoever in rejecting the approach to the evaluation of the evidence suggested by Encik Das and in accepting that suggested by Encik Nathan.

The Applicable Law

There is no serious dispute about the propositions of law that are to be applied to this case. The first is the rule in *Turquand*; the second, the doctrine of the *bona fide* purchaser for value. I had originally intended to deal with each of them briefly, but because this may result in insufficient consideration being given to the researches of Counsel, I have decided to deal with the authorities in some detail.

The Rule in Turquand

The rule in *Turquand* has been expressed by *Palmer's Company Law* 24th Edn., at p. 247 in the following terms:

According to this rule, while persons dealing with a company are assumed to have read the public documents of the company and to have ascertained that the proposed transaction is not inconsistent therewith, they are not required to do more; they need not inquire into the regularity of the internal proceedings - What Lord Hatherley (in *Mahony v. East Holyford Mining Co.* [1875] LR 7 HL 869, 898) called 'the indoor management' - and may assume that all is being done regularly (*omnia praesumuntur rite et solemniter esse acta*).

This rule, which is based on a general presumption of law, is eminently practical, for business could not be carried on if a person dealing with the apparent agents of a company was compelled to call for evidence that all internal regulations had been duly observed. Thus, where the articles give power to borrow with the sanction of an ordinary resolution of the general meeting, a lender who relies on this power need not inquire whether such sanction has in fact been obtained. He may assume that it has, and if he is acting *bona fide* he will, even though the sanction has not been obtained, stand in as good a position as if it had been obtained.

Atkin LJ in *Kreditbank Cassel G.M.B.H. v. Schenkers Ltd.* [1927] 1 KB 826, 844, expressed what has come to be accepted as the agency limb of the rule in *Turquand* in words that bear recollection:

> The true limits of the doctrine as to the effect of an article which empowers the company or its directors to nominate a person to have authority to do a particular act on behalf of the company are, I think, made quite plain in the judgments in *Houghton & Co. v. Nothard, Lowe & Wills* [1927] 1 KB 246. It is therefore unnecessary to consider further the doctrine as to the knowledge of the articles of association of a company. I may say this, however, that the doctrine is as to the knowledge of the articles; that is to say, the person is to be in the same position as if he had read them, and if he had, all that he would see would be that the directors had power to nominate the particular individual who could sign bills of exchange. In such a case a person reading the articles would be in no better a position unless he went further and inquired whether or not the directors had in fact nominated that particular individual to sign the bills. There are cases where that inquiry need not be made. When, for example, you find power given to do a certain thing, and the act can be done by the company in board meeting, and there purports to be a resolution authorizing it, you are not obliged to inquire whether or not the forms of the company required by the articles as to the constitution of the board, the quorum and so forth, have been actually complied with. If you are dealing with a director in a matter in which normally a director would have power to act for the company you are not obliged to inquire whether or not the formalities required by the articles have been complied with before he exercises that power. Those are matters of internal management an outsider is not obliged to investigate.

The public documents available for inspection by the public include the returns lodged by a company with the Registrar. These will show who the directors and shareholders of a company are as at the date of the returns. In respect of directors, the return is filed in Form 49, which is the statutory form prescribed by the Companies Regulations 1966. If, therefore, an outsider deals with an individual low in the corporate hierarchy, he cannot take advantage of the rule in *Turquand*. This is illustrated by the decisions of the Federal Court in *Chew Hock San & Ors. v. Connaught Housing Development Sdn. Bhd.* [1985] 1 MLJ 350, 354, and by the Supreme Court in *KL Engineering Sdn. Bhd. & Anor. v. Arab Malaysian Finance Bhd.* [1994] 2 MLJ 201, 209.

In *Chew Hock San*, Syed Agil Barakbah FJ held the outsider to be disentitled to rely on the agency limb of the rule in the following words:

> It was also submitted that DW1 could have been authorised to accept bookings by the booking clerks, as admitted by DW2, and in the absence of evidence that the booking clerks were not authorised to delegate. In this regard, the accepted principle is that the 'apparent' authority must be made by someone who had the 'actual' authority to make such representation as empowered by the memorandum and articles of association of the company. This is normally conferred upon the board of directors or those having the powers of management to delegate authority to some other person. (*Freeman's* case (*supra*) and *British Bank of the Middle East v. Sun Life Assurance Co. of Canada (U.K.) Ltd.* [1983] 2 Lloyds Rep. 9). If at all the two clerks had delegated their work to DW1, it is apparent that they have no authority to do so in the absence of evidence that they had actual authority to delegate such power to DW1. Similarly, the conduct of the respondent's receptionist in directing the appellants to see DW1 as the person to receive bookings, if such allegations are true, cannot amount to a representation by the respondent in the circumstances.
>
> ...
>
> In our considered judgment, this was a case here it would not normally be expected to be within the authority of DW1 to act as he did in the circumstances, and any holding out by DW1 at the material time was done without the knowledge and consent of the respondent.

We agree with the learned Judge that there was no representation by the respondent that DW1 was authorised to accept bookings on its behalf.

In *KL Engineering*, Mohamed Dzaiddin SCJ explained the importance of Form 49 as follows:

Cik Jennifer Tay has urged us to treat Form 49 as an 'indoor management' document so that the respondent could take advantage of the rule in *Turquand's* case.

This rule was stated by Lord Simonds in *Morris v. Kanssen* as follows (at p. 474):

> But persons contracting with a company and dealing in good faith may assume that acts within its constitution and power have been properly and duly performed and are not bound to inquire whether acts of internal management have been regular.

According to his Lordship (at p. 475):

> It is a rule designed for the protection of those who are entitled to assume, just because they cannot know, that the person with whom they deal has the authority which he claims. **This is clearly shown by the fact that the rule cannot be invoked if the condition is no longer satisfied, that is, if he who would invoke it is put upon his inquiry. He cannot presume in his own favour that things are rightly done if inquiry that he ought to make would tell him that they were wrongly done.**
>
> Based on Lord Simond's dictum, we say with confidence that the rule in *Turquand's* case does not apply here. We hasten to add that as Form 49 (D14) is a public document to which the common law doctrine of constructive notice applies, the respondent, having been put upon inquiry of its content, but failed to check, must be presumed to have known that at the material time, James Kow Yuen Wah was not a director of the first appellant and was, therefore, not authorized to sign P7 on the company's behalf. Accordingly, as P7 was signed by an unauthorized person on behalf of the first appellant, the latter cannot be made liable under the hire-purchase agreement, P7. (Emphasis supplied).

In the context of the second and third defendants being the most important persons in the first defendant company and that it was with them that the intervener dealt with, Encik Das cited the following passage in the speech of Lord Reid in *Tesco Ltd. v. Nattrass* [1971] 2 WLR 1166, 1177:

Reference is frequently made to the judgment of Denning LJ in *H.L. Bolton (Engineering) Co. Ltd. v. T.J. Graham & Sons Ltd.* [1957] 1 QB 159. He said, at p. 172:

> A company may in many ways be likened to a human body. It has a brain and nerve centre which controls what it does. It also has hands which hold the tools and act in accordance with directors from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company, and control what it does. The state of mind of these managers is the state of mind of the company and is treated by the law as such.
>
> In that case the directors of the company only met once a year: they left the management of the business to others, and it was the intention of those managers which was imputed to the company. I think that was right. There have been attempts to apply Lord Denning's words to all servants of a company whose work is brain work, or who exercise some managerial discretion under the direction of superior officers of the company. I do not think that Lord Denning intended to refer to them. He only referred to those who 'represent the directing mind and will of the company, and control what it does'.

With respect, I have always held the view that the symbolic representation alluded to by Lord Denning in *Bolton* (*supra*) to be an oversimplification of the rule by which the knowledge or other state of mind of an officer of a company is attributed to the company. It is important to bear in mind that there are several rules of attribution that operate in the environment of company law that are directed at equating a company with a natural person. Which set of rules are to apply depends upon the peculiar circumstances of a particular case. In any given case it is a matter of construing the particular statute or rule of common law to fit the fact pattern that presents itself for judicial resolution.

Since preparing the first draft of this judgment, I have come across the very recent decision of the Privy Council in *Meridian Global Funds Management Asia Ltd. v. Securities Commission* handed down on 26 June 1995 (The Times, 29 June 1995), an appeal from New Zealand, which appears to support the view I take of the law. For present purposes, it is sufficient to quote the following extracts from the report of the judgment of Lord Hoffmann who delivered the advice of the board:

> The phrase "directing mind and will" came from the speech of Viscount Haldane, Lord Chancellor, in *Lennard's Carrying Co. Ltd. v. Asiatic Petroleum Co. Ltd.* [1915] AC 705, 713. But there had been some misunderstanding of the true principle upon which that case was decided.
>
> Any proposition about a company necessarily involved a reference to a set of rules. A company existed because there was a rule, usually in a statute, which said that a *persona ficta* should be deemed to exist and to have certain of the powers, rights and duties of a natural person. It was unnecessary part of corporate personality that there should be rules by which acts were attributed to the company: the rules of attribution.
>
> The company's primary rules of attribution would generally be found in its constitution, typically the articles of association, but were also implied by company law.
>
> Those primary rules of attribution were not enough to enable a company to go out into the world and do business. The company therefore used general rules of attribution equally available to natural persons, namely, the principles of agency.
>
> It appointed servants and agents whose acts, by a combination of the general principles of agency and the company's primary rules of attribution, counted as the acts of the company. And having done so, it would also make itself subject to the general rules by which liability for the acts of others could be attributed to natural persons, such as estoppel or ostensible authority in contract and vicarious liability in tort.
>
> Any statement about what a company had or had not done, or could or could not do, was necessarily a reference to the rules of attribution, primary and general, as they applied to that company. There was no such thing as the company as such, only the applicable rules.
>
> To say that a company could not do something meant only that there was no one whose doing of that act would, under the applicable rules of attribution, count as an act of the company.
>
> The company's primary rules of attribution together with the general principles of agency and so forth were usually sufficient to enable one to determine its rights and obligations.
>
> In exceptional cases, however, they would not provide an answer. That would be the case when a rule of law expressly or by implication excluded attribution on the basis of the general principles of agency or vicarious liability.
>
> That was generally true of rules of the criminal law, which ordinarily imposed liability only for the *actus reus* and *mens rea* of the defendant himself. How was such a rule to be applied to a company?

The Court might conclude that the rule was not intended to apply to companies at all, or the Court might interpret the law as meaning that it could apply to a company only on the basis of its primary rules of attribution, that is, if the act giving rise to liability was specifically authorised by a resolution of the board or a unanimous agreement of the shareholders.

But there would be many cases in which neither of those solutions was satisfactory and the Court had to fashion a special rule of attribution for the particular substantive rule.

That was always a matter of interpretation given that it was intended to apply to a company, how was it intended to apply? Whose act or knowledge or state of mind was for that purpose in law to count as the act, knowledge or state of mind of the company?

The answer was to be found by applying the usual canons of interpretation, taking into account the language of the rule, if it was a statue, and its content and policy.

The fact that the rule of attribution was a matter of interpretation or construction of the relevant substantive rule was shown by the contrast between two decision of the House of Lords: *Tesco Supermarkets Ltd. v. Nattrass* [1972] AC 153 and *In re Supply of Ready Mixed Concrete (No. 2)* [1995] 1 AC 456

In *Lennard's* case the substantive provision for which an attribution rule had to be devised was s. 502 of the Merchant Shipping Act 1894, which provided a shipowner with a defence to a claim for loss of cargo.

Guided by the language and purpose of the section, Viscount Haldane had looked for the person whose functions in the company, in relation to the cause of the casualty, were the same as those to be expected of the individual shipowner to whom the language primarily applied.

That person was Mr.Lennard, whom Viscount Haldane had described as the 'directing mind and will' of the company. It was therefore his fault or privity which s. 502 attributed to the company.

Because that company did not do anything except own ships, there was no need to distinguish between the person who fulfilled the function of running the company's business in general and the person whose functions corresponded, in relation to the cause of the casualty, to those of an individual shipowner.

They were one and the same person. It was that coincidence which left Viscount Haldane's speech open to the interpretation that he was expounding a general metaphysic of companies.

In *H.L. Bolton (Engineering) Co Ltd. v. T.J. Graham & Sons Ltd.* [1957] 1 QB 159 Lord Justice Denning certainly regarded it as a generalisation about companies as such when (at p 172) he likened a company to a human body.

But that anthropomorphism distracted attention from the purpose for which Viscount Haldane had said he was using the notion of directing mind and will, namely to apply the attribution rule derived from s. 502 to the particular defendant in the case.

The true nature of the exercise became clearer in later cases on the Merchant Shipping Act 1894: *The Truculent* [1952] P 1 and *The Lady Gwendolen* [1965] p. 294

The phrase 'directing mind and will' did not fit the facts of those two cases as happily as it did those of *Lennard's* case. The difficulty had been caused by concentration on that particular phrase rather than the purpose for which Viscount Haldane was using it.

It would often be the most appropriate description of the person designated by the relevant attribution rule but it might be better to acknowledge that not every such rule had to be forced into the same formula. (Emphasis supplied).

A careful consideration of the authorities relied upon by Encik Das do not appear to support the proposition he has advanced. Instead, they support quite a different proposition that is not relevant to this part of his argument.

I think that, it inconvenient, at this point, to deal with the decision of the High Court of Australia in *Northside Developments Pty. Ltd. v. Registrar General* 170 CLR 146 which was cited by Counsel and where the facts were these. The sole asset of a company was mortgaged to a bank to provide borrowing facilities to another company which was wholly unrelated to the surety company and having no business connection with it. However, the managing director of the surety company controlled the borrower company. The instrument of mortgage was executed under seal by the managing director and his son, who was falsely described as the company secretary. The question that arose for decision was whether the bank could enforce the mortgage by relying on the rule in *Turquand* with the pivotal point being whether the bank was put on inquiry. The further question that arose was whether the rule applied where there was a forgery. At first instance, Young J held against the bank. On appeal, the Court of Appeal (N.S.W.) reversed him and found for the bank. On further appeal, the High Court reversed the Court of Appeal and restored the judgment of Young J.

Counsel read to this Court the following passage from the judgment of Brennan J in the High Court where, after citing several authorities including *Morris v. Kanssen* (*supra*), his Honour said (at p. 182):

> In these cases, it was the nature of the transaction which put the party purportedly dealing with the company on inquiry. Although the nature of the transaction is not the only factor which might put a party on inquiry, it is often, and importantly, the factor on which the application of the indoor management rule depends.

However, earlier in the same judgment (at p. 180) are to be found these words:

> A party dealing with a company cannot assume that its officers or agents have a particular authority if the circumstances are such as to put that party on inquiry as to whether the authority exists and no inquiry is made or the company fails to satisfy the inquiry.

Having considered the several authorities cited by Counsel, I am left in no doubt that whether the rule in *Turquand* applies or whether the outsider should be held to have been put on inquiry depends upon the particular and peculiar facts of each case. In my judgment it is neither possible nor desirable to even attempt to state what are the paramount criteria, if any, which a Court should have in mind when deciding whether an outsider ought to have been put on inquiry. The rule and the qualification to it are meant to be applied flexibly to suit the circumstances of individual cases and nothing should be done to deprive them of that flexibility. In my judgment, the true principle is that a Court should have regard to all the circumstances of a particular case and perhaps attach some additional weight, where necessary, to certain facts that are important in the context of that case, and perhaps attach less weight to certain other facts that appear to be less important to the making of the determination. Whether the learned Judge's perception of the sum-total of the evidentiary material before him is sustainable is a matter that has to be considered later.

Bona fide Purchaser

I must say at once that on the facts of the present appeal, the rule in *Turquand* and the doctrine of the *bona fide* purchaser run an almost parallel course. This is because the facts and circumstances that are said to disqualify the intervener from placing reliance upon the rule and those which are said to exclude the operation of the doctrine are identical or almost

identical. There are of course certain facts which are peculiar to the application or more appropriately, the exclusion of the doctrine. That is the result of the particular subject matter being land.

Although Encik Das commenced his submission by asserting that his client was a *bona fide* purchaser and hence came within the protection afforded by the doctrine, he retreated from that position during the course of his argument. In fairness to him, I shall reproduce his amended argument in the very words that he used. This is what he said:

> I base my case on the proposition that I have a good contract. Whether I am a *bona fide* purchaser does not enter upon the question. I have a good contract. I can enforce it by completion.

There is no doubt in my mind that on the facts of the instant case this submission of Counsel cannot stand up to close scrutiny. It must not be forgotten that this is a case where the subject matter of the particular contract is immovable property. Accordingly, the question whether the intervener acquired any rights to that property under the agreement dated 3 December 1990 has to be resolved by reference to the law governing contracts relating to immovable property. There is a reason for this. The law rebuttably presumes that the breach of a contract for the sale and purchase of such property is not remediable by an award of monetary compensation. (See s. 11(2) of the Specific Relief Act 1950). This presumption is inverted for contracts relating to movable property.

In my judgment, the rule in *Turquand* when applied to a contract for the purchase of land under our version of the Torrens system has to work hand in hand with the doctrine of the *bona fide* purchaser. To put it in the context of the present case, the intervener may be entitled to take advantage of the rule in *Turquand* if he can show that he is a *bona fide* purchaser of the six lots of land in question. Viewed this way, the rule and the doctrine operate compositely and it is no answer merely to say that one has an enforceable contract. It begs the question: a contract for what? And the answer comes: a contract to purchase land. So the rule about contracts concerning land have to be applied. Having said this, I turn to consider the content of the doctrine.

The purchaser of immovable property under a contract is, prior to registration of his title under the provisions of the National Land Code 1965 entitled to assert his rights under the contract as against all comers, including anyone who has previously entered into a similar contract for the same land, if he demonstrates that he purchased the land in good faith without notice of any adverse claim to the title to the land. That as I understand it is the doctrine of the *bona fide* purchaser as applied in the local context. It is a doctrine created by the Court of Chancery. But I am not at all sure whether the English principle of constructive notice which is part and parcel of their version of the doctrine applies to contracts for the sale of land in this country in the face of the system for the protection of interests by the entry of caveats. (See *Eng Mee Yong v. Letchumanan* [1979] 2 MLJ 212.).

There are several elements that go to make up the doctrine and I perceive that it is no part of my function in this appeal to analyse each of them. It is therefore sufficient, in the context of the present case to determine whether the intervener is a *bona fide* purchaser.

Now, I take two matters as settled law. The first is the proposition that one is not a *bona fide* purchaser until one has paid all one's money under the contract for sale. A person who pays only a deposit and, under the terms of a written or oral contract agrees to pay the balance later (in the present case after three months) is not a *bona fide* purchaser. I need only cite two authorities. The first is *Doshi v. Yeoh Tiong Lay* [1975] 2 MLJ 85. The second is *M & J Frozen Food Sdn. Bhd. v. Siland Sdn. Bhd.* [1994] 1 MLJ 294.

In *Doshi* (*supra*), citing *Morland v. Hales and Somerville* [1911] 30 NZLR 201, Gill FJ (at p. 88) accepted the law to be as follows:

> It is said that the respondent cannot claim to be a purchaser for value without notice because he had not paid the full purchase price. The authority relied on for this assertion is the New Zealand case of *Morland v. Hales and Somerville* in which it was said that Somerville could not claim as purchaser for value without notice, as his contract had not yet been completed by payment of the purchase price and the conveyance of the legal estate. But here the legal estate was conveyed to the respondent by an instrument of transfer which was duly registered. It is true that he paid only 10% of the purchase price in cash, but he executed a charge on the property to secure payment of the balance of the purchase price. It therefore cannot be said that he is not a purchaser for value.

In *M & J Frozen Foods* (*supra*), Wan Yahaya SCJ said:

> Although the authorities seem to differ on the level of transaction at which the bare or constructive trusteeship would arise, the rationale are unanimous on one issue, i.e. such trusteeship can only arise on payment of the balance of the purchase price or on payment of the full purchase price. In *Peninsular Land Development Sdn. Bhd. v. K Ahmad,* [1970] 1 MLJ 149, Suffian FJ (as he then was) said that the beneficial ownership passes to the purchaser as soon as the purchase price has been paid. So was it held in the New Zealand case of *Official Assignee v. Johnston* where the Court held that the purchaser only became owner of the land subject to his obligation to pay the purchase price.
>
> It would appear from the above-cited cases that the vendor is regarded as having divested himself of all the beneficial interest in his land and vested it in the purchaser only at the time when the memorandum of transfer is executed **and** the purchase money is paid in full - see *Karruppiah Chettiar v. Subramaniam* [1971] 2 MLJ 116, at p 119. (Emphasis added).

The second proposition which I accept as well settled is that the knowledge of a solicitor is regarded by the law as the knowledge of the client. The only exception to this is where the solicitor acts fraudulently *vis a vis* his client. I cite once again from *Doshi* (at p. 88):

> Now the general rule is that the knowledge of a solicitor is the knowledge of the client, so that it is not open to the client to say that the solicitor did not disclose the true facts to him. Thus in *Rolland v. Hart* [1870] Ch App 678, 681 which was followed by the High Court of Australia in *Stuart v. Kingston* [1923] 32 CLR 309 Lord Hatherley LC said:
>
> > Then the only question is, what is actual notice? It has been held over and over again that notice to a solicitor of a transaction, and about a matter as to which it is part of his duty to inform himself, is actual notice to the client. Mankind would not be safe if it were held that, under such circumstances, a man has not notice of that which his agent has actual notice of. The purchaser of an estate has, in ordinary cases, no personal knowledge of the title, but employs a solicitor, and can never be allowed to say that he knew nothing of some prior encumbrance because he was not told of it by him solicitor.
>
> In *Bradley v. Riches* [1878] 9 ChD 189 it was held that the presumption that a solicitor has communicated to his client facts which he ought to have made known cannot be rebutted by proof that it was the solicitor's interest to conceal the facts.
>
> There is, however, an important exception to the above rule in cases of fraud, which is stated in *Halsbury's Laws of England* (3rd Edn.,) Vol. 14, para. 1019 (at p. 543) as follows:
>
> > Under the head of actual notice is included notice to an agent employed in the transaction. The notice imputed to the principle, and it affects him whether communicated to him or not; but an exception is admitted where there has been fraud on the part of the agent in the matter. Although actual communication to the principal is not required, yet fraud excludes in practice all probability of communication, and hence the knowledge of the fraudulent agent is not imputed to the principal.

> **It is thus clear that his solicitor's knowledge of fraud, if any, cannot be imputed to the respondent. I must therefore reject the appellant's contention that if the respondent had notice by his agent of the previous transactions, then his entering into an agreement to purchase the premises was tantamount to fraud.** (Emphasis added).

There is little doubt that the words in the judgment of Gill FJ upon which I have placed emphasis were expressed in clear misunderstanding of the passage from *Halsbury* which was cited by his Lordship. Encik Das said that whatever *Halsbury* may say, the Federal Court had established an independent principle. I regret that I am unable to agree. The words "It is **thus** clear" with which the proposition begins is clear indication that that proposition rests, not upon some independent theory, but upon the passage from *Halsbury* that precedes it.

Encik Das also contended that the doctrine of imputed knowledge has no room in the sphere of the rule in *Turquand*. Again I regret that I am unable to agree with Counsel who appears to have overlooked the following passage in *Ford on Company Law* 5th Edn., p. 106:

> **Knowledge possessed by an outsider's agents may be imputed to the outsider.** Under the equitable doctrine of notice, actual or constructive notice of a matter that is possessed by an agent of a person dealing with a company will be imputed to the principal where the agent was under a duty to communicate the knowledge to the principal: *Sargent v. ASL Developments Ltd.* [1974] 131 CLR 634 at 658-9. This is not to be confused with attribution to a company of the mental state of its controllers; the company then has original notice, not just imputed notice... Whether an agent has received notice is a question of fact: *Sunny West Co-operative Dairies Ltd v. W O Johnston & Sons* [1965] WAR 232. For a principal to be fixed with the knowledge of an agent it can be enough that the agent receives reasonably explicit information even from a third person not involved in the particular transaction: *Lloyd v. Banks* [1868] LR 3 Ch App 488.

Thus, a company is no different in law from a human when it comes to the acquisition of knowledge of facts by the conduit of an agent.

The Caveats

It is convenient at this stage to deal with the effect of the two caveats entered by the first plaintiff. Encik Das submitted that the first caveat was quite useless *qua* caveat. He also submitted that the effect of a caveat was not to give notice to the world at large but merely to put the registering authority on notice of an adverse claim. In support of the latter proposition he cited *J & H Just (Holdings) Pty. Ltd. v. The Bank of New South Wales* [1971] 125 CLR 546, and in particular the following passage in the headnote at p. 547:

> The purpose of a caveat is to act as an injunction to the Registrar-General to prevent registration of dealings with the land until notice has been given to the caveator; it is not to give notice to the world or to persons who may consider dealing with the registered proprietor of the caveator's estate or interest.

I then referred Counsel to the decision of the Victorian Court in *Osmanoski v. Rose* [1974] VR 523 where Gowans J pointed out that the rationale in *J & H Just (Holdings)* (*supra*) as to the effect of a caveat was dictated by the terms of the New South Wales statute. I also drew Counsel's attention to the provisions of the National Land Code dealing with caveats. After an exchange of views, Encik Das agreed that, in the face of our statutory provisions and the general law, although the first caveat might have been useless as a caveat, it did constitute notice to the world at large of its contents. However, he said that his client had acted prudently despite the existence of the first caveat. That of course is a different matter altogether and one that falls to be decided according to the facts of the case.

With regard to the second caveat, the submission is that it came too late, that is to say, after the sale and purchase agreement had been entered into. It was submitted that the intervener having paid the 10% deposit was already a *bona fide* purchaser and that therefore the second caveat was *nihil ad rem*. It was in response to this submission that I drew the attention of Encik Das to the decisions in *Doshi* and in *M&J Frozen Food*.

In the light of our own common law there is no basis to suggest that the second caveat came too late. As a matter of pure law, when the second caveat was entered, the intervener was not a *bona fide* purchaser of the lands in question. The question then arises whether he could become a *bona fide* purchaser by its mere removal, after he had acquired knowledge of its contents. For my part, I would, with confidence, answer that question in the negative. In my judgment, as matter of law, once a man's mind has become infected with knowledge of an adverse claim or doubt or cloud upon the vendor's right to convey title before he has paid his money in full, he remains what he was at the earlier stage: a person who is not a *bona fide* purchaser.

Applying Statue by Analogy

There is one last point that I think that I should deal with although it in no way influences my decision. It is a matter which I raised during argument. When Encik Das submitted initially that he was relying on doctrine of the *bona fide* purchaser, I drew his attention to the provisions of s. 26 (b) of the Specific Relief Act 1950 which reads as follows:

> 26 . Except as otherwise provided by this Chapter, specific performance of a contract may be enforced against:
>
> (a) ...
>
> (b) any other person claiming under a party to the contract by a title arising subsequently to the contract, except a tansferee for value who has paid his money in good faith and without notice of the original contract.

I also drew his attention to certain passages in the judgment of Lord Thankerton in *Bhup Narain Singh v. Gokhul Chand Mahton* LR 61 IA 115 which clearly indicate that the burden of proving that he is a *bona fide* purchaser lies upon him who so asserts.

Encik Das, while agreeing that there was an evidential burden upon him, nevertheless pointed out the inapplicability of the section to the facts of the present case. I think that Encik Das is quite correct in that submission. However, there is a doctrine of ancient repute that in appropriate cases a Court may act by analogy of statute. That is not to say, as Encik Das seems to have understood it, that the definition of words in one statute are to be used to construe similar words appearing in a different context in another statue. (See Lord Thankerton in *Bhup Narain Singh* at p. 12).

What I had in mind was to free ourselves of the shackles of English law and to develop our own notion of what is meant by a purchaser by drawing on the analogy of decisions under the statute, all of which are unanimous in holding that a man is not to be regarded as a purchaser unless he has paid all his money under the contract of sale. See *Sinna Ponnu v. Singaru Odayar* [1969] 2 Madras LJ 358; *Vomisetti Paparao v. Jonnada Venkataramana* [1970] 2 An. WR 280.

In the former case, Ramamurti J said:

> In a recent bench judgment reported in *Veeramalai Vanniar v. Thadikara Vanniar* [1968] 1 Madras LJ 437, of which I was a member, this identical point came up for discussion and on a consideration of the entire case-law it was held that a transferee, to claim the protection

under s. 27(b) of the Specific Relief Act, (which is in *pari materia* with our s. 26(b)) must have paid the entire consideration and if for any portion of the price, a security alone had been executed, the transferee cannot claim to be a transferee 'who has paid his money'. This principle was laid down in the leading decision in *Himatlal Motilal v. Vasudev Ganesh* [1912] ILR 36 Bom 446 and it has been uniformly followed in all the Courts. In every one these decisions, it has been held that the words 'who has paid his money' in s. 27(b) of the Specific Relief Act means a person who has paid 'the whole of the consideration' and not a transferee who has paid only part of it and that the words 'who has agreed to pay' his money either in whole or part.

To emphasise the point I make, I ask once again: why should we slavishly follow English decisions when we have statutory analogies locally? But it would appear that my views must await expression as *ratio* in some other case.

It is I think now appropriate to see how the learned Judge approached the issues that have been discussed thus far.

The Judgment

This is what the learned Judge said about the intervener's case:

I see no good reasons therefore for the intervener to proceed with the final payment of the purchase price of the said lands other than to proceed with all haste in tandem with the 2nd to 9th defendants so that the intervener hoped to get the titles registered in its name and thereby getting indefeasible titles. As I said earlier the speed with which the intervener and the defendants took to finalise the sale of the said land with the co-operation of their solicitors was purposely to deprive the plaintiffs of their interests. If IW1 had contacted PW1 he knew fully well that the transaction would in all probability be aborted and hence, with the co-operation of DW2 and DW3, tried to get the titles registered in the intervener company's name and thereby hoping to defeat the plaintiffs' claim. This is further borne out by the fact that the intervener even tried to register the registration of the transfer of the said lands in the face of an injunctive order.

I am of the opinion that the conduct of IW1 before as well as after the execution of the SPA would seem clearly to show that the intervener was not a *bona fide* purchaser who acted without the knowledge of the irregularity in the affairs of the 1st defendant company. In the circumstances the intervener, in my view, cannot rely on the authority of the *Turquand's* case as it, was not dealing in good faith with the 1st defendant company as it had notice of the irregularity and I accordingly declare the SPA as null and void and of no effect. It is open to the intervener to take action against the 2nd to 9th defendants personally for recovery of the money paid and the damages, if any, as they were the ones who pocketed the money.

Having read and re-read the printed and documentary evidence in the appeal record, I must confess my own inability to detect any error in the reasoning of the learned Judge. I shall now take each point of criticism made by Encik Das and show why he is wrong and the learned Judge was correct.

A Factual Analysis

First, Counsel submits that the agreement of 3 December 1990 was a normal one and there was nothing in it to excite his client's suspicions. But that is not quite correct. As I observed earlier during the narration of the chronology, the first defendant had a registered office at Sibu. The agreement when sent in draft to the vendor's solicitors, was amended by them. They, no doubt acting upon the instruction of the second and third defendants deleted the registered address and instead used an address care-of the solicitors. But that is not the registered address, nor, as my learned brother V.C. George JCA observed during argument, was it the usual place of the first defendant's business.

Surely, Dato Tan, who by his own evidence is a man with some experience in such matters, ought to have asked himself why a solicitors' address was being used instead of the first defendant's registered office. By itself it may have meant nothing. But then one has the first caveat which pre-dated the agreement and even the option in which some person other than those he was dealing with claims to be the chairman and managing director of the first defendant. And in that first caveat one finds the registered address of the company. Should it not have then occurred to Dato Tan that the omission of the registered address may have been to prevent any notices required to be given under the agreement from reaching the registered address? It can therefore hardly be said that this was normal agreement or a routine transaction from the very start.

Secondly, Encik Das submits that this was from the very beginning a routine transaction. Solicitors were engaged to settle the terms of the agreement. They exchanged all relevant documents, including resolutions of the first defendant authorising the sale. Payments were made through solicitors. There was nothing out of the ordinary.

But a close and careful examination of the evidence contradicts Counsel. Let me take some of the salient points in numbered sequence.

(1) At the outset there is the first caveat. As I have earlier said, Encik Das conceded that it was good as notice to the world at large of the matters it contained. However, he submits that his client acted prudently because he was repeatedly advised by his solicitor that there was no caveatable interest.

I think that the point made by the learned Judge has been missed by Counsel. The vital question is this: knowing that someone else is claiming to be the chairman and managing director of the vendor and that the titles had been allegedly removed without authority, is it prudent to continue to deal with those who may be bereft of authority to act on behalf of the company? It is no wonder that the learned Judge found the intervener to have been put on inquiry.

(2) Next we have the negotiations for the sale and purchase which preceded the grant of the option. These were conducted through brokers. The asking price, according to Dato Tan's evidence was RM6 million. He made a counter-offer of RM4 million and then negotiated it at RM4.8 million. Now, there was an open challenge by the plaintiffs in their contention that the purchase price was in reality RM6 million. It was therefore incumbent upon the intervener to have called the brokers who were physically present in Court to denounce the plaintiffs' suggestion as a monstrous one. That was, for some inexplicable reason not done.

No criticism may therefore be validly leveled against the learned Judge for drawing an adverse inference against the intervener for this failure. Indeed, throughout his lengthy submissions, I did not understand Encik Das as having any complaint about this exercise of discretion by the learned Judge. I say discretion because the presumption under s. 114(g) of the Evidence Act 1950 is not mandatory, the actual word used being "may". What I did understand Encik Das as saying was that some hard evidence should have been led to show that the price was in truth RM6 million. But the s. 114(g) presumption was there and its effect on its invocation was: if called, the brokers would have said that the true purchase price was RM6 million.

(3) I now come to the option. It may be recalled that Dato Tan paid a very large sum - RM100,000 for the option. He paid it in cash and got no receipt for it. I asked Encik Nathan whether the option was not itself a valid receipt and he quite rightly replied

that if it was a receipt then it came, not from the company, but from the second defendant personally.

In a transaction such as this, where large sums are involved, it is not normal to make payments in cash, especially when the vendor is a limited company. Dato Tan recognised this. For this is what he said in his evidence:

> I paid the option money in cash as I am used to dealing in cash. I knew that those lands belonged to a limited company. **I agree that it is more prudent to use account payee cheque in dealing with a limited company.** (Emphasis added).

There you have an admission of imprudence. I think that an experienced person like Dato Tan ought to have asked himself why, if all was well within the company, was the option money not demanded in the form of a cheque.

Having paid such a large amount in cash, why then did Dato Tan not ask for a receipt from the company? It would appear that he was prepared to put his money at risk without taking the most elementary of precautions.

Further, it is common ground that Dato Tan also did not take the precaution of calling for a resolution confirming that the second defendant had authority to act on behalf of the first defendant and effect a sale at RM4.8 million before he paid her the sum of RM100,000 in cash.

(4) I now come to the stage after the option but before the execution of the sale and purchase agreement. It comes as a matter of astonishment that the defendants were prepared to hand over vacant possession of the lands to Dato Tan immediately upon the issue of the option to him.

The usual thing to do is hold onto vacant possession until the option is exercised and the full purchase price is paid. Normally all sale and purchase agreements contain a provision for the delivery of vacant possession. There is many a slip betwixt the cup and the lip. And however creditworthy a potential purchaser may be, there is no guarantee that he will complete the sale.

Yet here we have a case where vacant possession was being handed over even before a concluded contract. And the written agreement makes no mention about vacant possession. I find this quite out of the ordinary.

Why the haste in giving Dato Tan vacant possession? Was Dato Tan being given this accommodation because he was prepared to pay more than the disclosed sum? After all, he was a man who was prepared to have cash dealings of large amounts. In these circumstances, I find it quite unacceptable that this should be referred to as a normal transaction.

(5) The next event is the purported execution of the sale and purchase agreement on 3 December 1990 when the intervener company had not been incorporated. I have already pointed this out earlier. There is one other matter which appears to be abnormal in this agreement. The usual deposit that is paid on execution of a sale and purchase agreement is 10%. Indeed, our Courts have recognised this to be the norm. See for example, *Linggi Plantations v. Jagatheesan* [1972] 1 MLJ 89.

But the deposit paid under the agreement now under consideration was RM668,000. It is neither 10%, nor 15% nor 20%. Data Tan said that he chose this figure "because it means prosperous all the way."

I do not think that the explanation impressed the Judge. It certainly does not impress me as being genuine. Viewed against all the surrounding circumstances, this figure of RM668,000 is not a normal deposit. It is abnormal. It is a matter that has to be taken into account together with all the other facts.

(6) We then have the execution of the transfer by a non-existent company. No explanation was made in the Court below as to why there was undue haste in concluding this transaction. Why could not the intervener wait for a few more days for incorporation? In fact, the intervener was in such a hurry to do the deal that even the ratifying resolution was defective because it made no provision for the ratification of the transfers. I am therefore not surprised that the learned Judge held that there was undue haste in this matter.

Encik Das, in his final reply submitted that it was not for the intervener to justify the numerous irregularities, if any, in its own affairs when it entered into the transaction. But the point here is that these irregularities constitute evidence that go to support the learned Judge's finding that there was undue haste.

(7) I now come to the payment of the balance of the purchase price. It will be recalled that Encik Das submitted that solicitors were involved in the payment of the balance of the purchase price. Let us see if that is the evidence .

It must be remembered that the balance of the purchase price had been paid to and refunded by the vendor's solicitors on account of the caveats. Thereafter, Dato Tan dealt directly with the second defendant and purported to complete the transaction by paying her the balance of the purchase price of RM4.132 million in cash in Singapore, in Singapore Dollars. He did this at the request of the second defendant. No solicitors were either present or acted in the matter of the completion.

Encik Das in his final reply maintained that solicitors were involved in the transaction until the very end because the cash payment in Singapore was made on the advice of solicitors and that it was above board. But I do not think that Dato Tan's evidence bears this out. It is best that I reproduce it. This is what he said in his evidence-in-chief:

> The money was returned to M/s. K.H.Choo & Co. before the 2nd defendant met me. RM4.132 million was returned to M/s. K.H.Choo & Co. On learning of this I was very angry and again I called up the 2nd defendant and scolded her. 2nd defendant was scared and I threatened to institute legal action against her and she promised to come the next day. She came the next day with Peter (3rd defendant) to my office. At the meeting in my office I scolded her and it took her 3 hours to explain. The meeting took 3 hours and not the explanation. At the conclusion of the meeting 2nd defendant said that she was sincere in wanting to sell the lands to me and she undertook to remove the caveat. **Before asking further proposal I called up Mr.Choo to find out whether there was really any problem to remove the caveat and Mr. Choo told me that there was no problem. I told 2nd defendant that the option had lapsed and we have to settle the deal as soon as possible. I even proposed whether to pay in Malaysian Ringgit or Singapore Dollar or in cash or cheque to settle the balance of the purchase price. 3rd defendant proposed cash in Singapore Dollar be paid as it would be more convenient.** (Emphasis added.).

Later, under cross-examination he added:

> I was angry when the balance of the purchase price was returned to my solicitors. I paid the balance of the purchase money in Singapore currency. **I paid the money in spite of the fact that 2nd defendant could not give me the property free of**

encumbrances. I did so only after the meeting with the 2nd and 3rd defendants and they were so sincere that they wanted to sell the lands to me and I need to save my face as the people in Pekan Nanas knew of my purchase of the lands. Further I spent half a million to improve the lands coupled with the fact that my lands were near to those lands. So I decided to purchase the lands when Mr. Choo promised me there would not be any problem to remove them. (Emphasis added).

The only "advice" which Encik Choo, the solicitor seems to have given is that there was no problem about removing the caveat. But the idea of making payment in cash in Singapore appears to have come from the second defendant and the intervener was prepared to go along with this on his own bat with no reference to any advice from any quarter.

If prudence required Dato Tan to pay RM100,000 by way of a cheque because the vendor was a limited company, then how much more prudent would it have been to do likewise for an amount forty times that sum? His explanation was that he had spent about half million ringgit improving the lands and did not wish to suffer a loss of face. I cannot but think that Dato Tan's face would have been better saved by his launching an action against the company and the other defendants rather than to hand over so much money in cash.

(8) I turn now to the delivery of the resolutions. It appears that the relevant resolutions were sent by the vendor's solicitors to the intervener's solicitors under cover of the letter of 8 March 1991. But it would appear that Dato Tan did not receive these until after the payment of the full balance of the purchase price. This comes across in para. 7 of his affidavit affirmed and filed in support of his application to set aside the injunction which reads as follows:

> 7. Upon the full payment of the purchase price of the said properties the 1st defendant delivered to the applicant all the necessary documents that is, the documents of title of the said properties, the company's resolutions approving the sale of the said properties and the memorandum and articles of association of the company to enable the applicant to present all the said documents for registration with the relevant land office.

Now, Encik Das, in his final reply strongly objected to any reliance being placed on this paragraph of the affidavit on the ground that Dato Tan had not been cross-examined about it. That submission would be entirely correct if the intention was to contradict Dato Tan under s. 145 of the Evidence Act or to impeach his credit under s. 155(c) of the Act. But as I understood Encik Nathan, he had not sought to establish any contradiction. I think he was perfectly entitled to rely on para. 7 as an admission under ss. 17, 18 and 21 of the Evidence Act: *M.A. Clyde v. Wong Ah Mei* [1970] 2 MLJ 183, 185.

The upshot is that there was no prior forwarding of these resolutions as suggested by Counsel when he opened the second appeal. Did the intervener then act with prudence by not calling for these resolutions at the very outset? I am inclined to answer that question in a firm negative.

(9) It is in evidence that these lands had been in the ownership of the first defendant company for more than five years before this purported disposal to the intervener. Tax was nevertheless payable because the registered proprietor of these lands was a company. Section 21B(1)(a) of the Real Property Gains Tax Act 1976 requires an acquirer of land to retain not more than 5% of the sale price pending assessment by Revenue. However, under Part II of the Schedule, the tax payable is only 5% of the chargeable

gain. It is noteworthy that although it is the disposer who is chargeable with the tax, it is the acquirer who must retain the 5%. This is because the purchaser will become liable for the payment of the tax in the event the vendor defaults in making payment.

Clause 10 of the agreement of 3 December 1990 does in fact require the vendor's solicitors to retain a sum of RM300,000 out of the balance of the purchase price for the payment of real property gains tax. Of course this was never done because of the payment in full being made in cash in Singapore to the second defendant. It appears that this clause was completely overlooked by the intervener, who was allegedly acting under solicitors' advice.

It would also appear that when the transaction was completed when Dato Tan made payment of the balance of the purchase price in cash in Singapore, he failed to comply with written law as he did not withhold 5% of the total sale price. He was taking a great risk because there was no assurance that the second defendant would pay the tax on behalf of the first defendant.

So it would seem that in its haste to acquire the lands, the intervener overlooked cl. 10 of the agreement and was even prepared to act in breach of the taxing statute. In the light of this evidence, can the learned Judge be faulted in making the findings that he did? I think not.

(10) I come now to the second caveat. It was entered at a time when the balance of the purchase price had not been paid in full. It served as a warning to Dato Tan and the intervener that all was not well and that the transaction ought not to be proceeded with. This was not a race between two competing purchasers to get onto the register. It was supposed to be a *bona fide* purchaser wanting to acquire these lands at market price. What was the urgency in rushing through the transaction when all concerned were fully aware that there was uncertainty about the second defendant's ability to represent the company? In these circumstances, the learned Judge could hardly be faulted for holding that the intervener was not a *bona fide* purchaser.

(11) It may be recalled that the *ad valorem* on the transfers was assessed at RM5,002,968.25 by the Collector of Stamp Duties for the purpose of levying duty. This transaction therefore required approval of the Foreign Investment Committee (FIC) under the relevant guidelines. No such approval was sought by the intervener. Dato Tan's explanation for this omission defies belief. This is what he said under cross-examination:

> I did not apply to FIC for approval for this land deal as I think it was not important.

This answer must have surely weighed upon the mind of the learned Judge who saw and heard the witness. As such, it cannot be gainsaid that there was ample material before the learned Judge to come to the conclusions he reached.

(12) As I earlier said, cl. 10 of the agreement of 3 December 1990 required the vendor's solicitors to withhold RM300,000 for real property gains tax. I think that it is a fair inference that the solicitors on both sides settled on this figure on instructions of their respective clients and based upon the requirement of law that 5% of the total sale price should be withheld. It is a matter of idle curiosity to arrive at the simple deduction that 5% of RM6 million is RM300,000. This reasonably supports the plaintiffs contention that the real sale price was RM6 million and not RM4.8 million.

> Encik Das said that there ought to have been hard evidence, not mere conjecture. But there is hard evidence in the form of cl. 10. And if there was any seriousness in the conduct of the intervener's case, then the brokers ought to have been called to place a lie on the plaintiffs' suggestion. So too ought the vendor's solicitor to have been called to testify and put paid to the allegation, based on documents, that the true price was RM6 million. All this was not done. Although the learned Judge did not do so, he would have well been entitled to draw an adverse inference for the failure to call the vendor's solicitor.

Having set out some of the relevant material, I take a step back and view the whole scenario. The picture that presents itself before me is entirely consonant with the learned Judge's assessment of the evidence and his conclusions. I say with some confidence that Counsel's submission in respect of the appreciation of the facts is wrong and the learned Judge was right.

Conclusion on the Second Appeal

To sum-up, there is but one conclusion that may be reached from the totality of the circumstances that have presented themselves before me in this appeal. It is this. The intervener was faced with a set of facts that must have aroused the deepest suspicions in the mind of a reasonable man in his position. He chose to put these facts aside and proceed notwithstanding the loud and clear warning that they sounded. It does not lie in his mouth to say that he relied on the public documents of the company. Neither can he say that he was a purchaser for value who acted in good faith. The Judge was entirely correct in the decision he reached. Accordingly, the second appeal was dismissed with the usual order as to costs. However, by reason of the orders made by the learned Judge, the parties were given general liberty to apply before the High Court for such directions as may be required in the working out of the judgment.

V. C. George JCA:

I have had the benefit of reading the judgment in draft of my learned brother Gopal Sri Ram, JCA and respectfully agree, for the reasons given therein, that each of these appeals should be dismissed with costs.

Hj. Abu Mansor bin Ali JCA:

I have had the benefit of reading the judgment in draft of my learned brother Gopal Sri Ram, JCA and respectfully agree, for the reasons given therein, that each of these appeals should be dismissed with costs.